TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 247.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HOWARD AND LAURA P. HOWARD, HIS WIFE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 1, 1899.

(17,344.)

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In the Court of Appeals of the District of Columbia

THE CHESAPEAKE AND OHIO RAILWAY CO., Appellant,
vs.
WILLIAM HOWARD & LAURA P. HOWARD, His Wife.
No. 845.

a Supreme Court of the District of Columbia.

WILLIAM HOWARD ET AL.
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY.
At Law. No. 28242.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed November 12, 1887.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife,
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY.
At Law. No. 28242.

The plaintiffs, William Howard and Laura P. Howard, wife of the said William Howard, sue the defendant, The Chesapeake and Ohio Railway Company, a foreign corporation during business within the District of Columbia, for that the defendant on the 16th day of November, 1886, was running and operating a line of railway between the cities of Louisville, in the State of Kentucky, and Washington, in the District of Columbia, and between the said cities was a common carrier of passengers for hire, and on the said 16th day of November, 1886, the said defendant, in consideration of the
2 usual and customary fare then and there paid by the said Laura P. Howard, agreed and contracted with the said Laura P. Howard to safely carry and transport her over their said line of railway from the said city of Louisville to the said city of Washington; and the plaintiffs say that the said Laura P. Howard, on the said 18th day of November, 1886, took passage on one of the defend-

ant's passenger trains at Louisville for the city of Washington, and the plaintiffs say that the said defendant did not safely carry and transport the said Laura P. Howard, but, on the contrary, at or near the town of Soldier, in the State of Kentucky, by the unskillfulness, carelessness, negligence, and mismanagement of the defendant's agents in charge of the said train, and *to* the negligence of the defendant's agents in using defective machinery in running said train, and while the said Laura P. Howard was exercising due care and caution, the sleeping car in which the said Laura P. Howard was riding left the track and train and went down an embankment about thirty feet deep and was completely demolished, and the said Laura P. Howard was badly wounded, bruised, contused, and was especially hurt and injured in her spine; by reason of which said injuries she has been, ever since receiving them, sick, infirm, and crippled, and she is advised that the injury to her spine is progressive and will be permanent, and during all this time she has suffered great pain of body and anguish of mind, and has been put to great expense and charges for medicines, nurses, and the employment of physicians; that she has incurred large expenses in traveling to New York, where she went for medical treatment, and for boarding, lodging, &c., away from her home, and for expenses in returning to her home in Kentucky, and because of her inability to discharge the duties thereof, consequent upon said injuries, she lost and has been deprived of the emoluments of her office as a clerk in the Agricultural Bureau of the Government.

By reason of all which pain and suffering, mental and physical, expenses, charges, loss of office, &c., the plaintiff claims thirty thousand dollars damages, together with costs of suit.

CHAS. J. NOURSE,
S. S. HENKLE,
Att'ys for Plaintiffs.

The defendant is to plead hereto on or before the first day of the first special term occurring twenty days after service hereof; otherwise judgment.

CHAS. J. NOURSE,
S. S. HENKLE,
Att'ys for Plaintiffs.

3 *Summons.*

Issued November 12, 1887.

In the Supreme Court of the District of Columbia, the 12th Day of November, 1887.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, Plaintiffs, *vs.* THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.	At Law.	No. 28242.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first

day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiffs' suit and show why *he* should not have judgment against you for the cause of action stated in *his* declaration.

Witness E. F. Bingham, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[SEAL.]

HENK-E — MOORE, *Attorney-*.

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, and this summons on the defendant, The Chesapeake & Ohio Railway Company, by service on C. H. Chapin, agent said Co., the 14th day of Nov., 1887.

A. A. WILSON, *Marshal.*

4 *Pleas of Defendant.*

Filed December 6, 1887.

Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE AND OHIO RAILWAY COMPANY.	At Law.	No. 23242.

Pleas of the defendant to the jurisdiction of the court.

The defendant, not submitting to the jurisdiction of the court, but expressly protesting against the same and for its pleas thereto, says:

1st. That it is a foreign corporation, incorporated under the laws of the State of Virginia and West Virginia and subject to the jurisdiction of the courts of said States; that on or about the 27th day of October, 1887, the circuit court of the county of Henrico, in the State of Virginia, having jurisdiction so to do, in a suit in equity then and there pending in said court, made an order and decree putting the property of said defendant into the hands of William C. Wickham, as receiver of said court, and on or about the 28th day of October, 1887, in proceedings pending in equity in the circuit court of Kanawha county, West Virginia, having jurisdiction so to do, an order was made by said court appointing said William C. Wickham receiver as aforesaid of the property of said defendant, by virtue of which said orders and decrees said William C. Wickham has since the passing thereof had control of and has operated the

said property of said defendant, as such receiver, and that at the time of the alleged service of the summons in this case, to wit, November 14th, 1887, C. H. Chapin, the person on whom the service of such summons purports to have been made, was not the agent of the said defendant nor a person conducting its business, but was the agent of the said William C. Wickham, receiver as aforesaid.

2nd. The said defendant further says that it is a foreign corporation, incorporated under the laws of the States of Virginia and West Virginia and subject to the jurisdiction of the courts of the said States, and does not submit to the jurisdiction of this court, and that it was not at the time of the alleged service of the process, to wit, November 14th, 1887, doing business within the District of Columbia.

W. WILLOUGHBY,
Att'y for Defendant.

5 *Memoranda.*

Jan. 4, '90. Motion to dismiss for want of prosecution.
" 9, " " " strike the plea from file and for judgment.
" 27, " Defendant's plea stricken out; default; jury of inquest ordered.

6 *Pleas of Defendant.*

Tendered for filing February 4, 1890.

Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE AND OHIO RAILWAY COMPANY.	At Law.	No. 28242.

The defendant, not waiving its plea to the jurisdiction heretofore made, by leave of the court pleads and says:

1. That it denies each and every allegation of the declaration of the plaintiffs, which is therein stated in the following words, to wit:

"That the defendant, on the 18th day of November, 1886, was running and operating a line of railway between the cities of Louisville, in the State of Kentucky, and Washington, in the District of Columbia, and between the said cities was a common carrier of passengers for hire, and on the said 18th day of November, 1886, the said defendant, in consideration of the usual and customary fare, then and there paid to its agent at the city of Louisville by the said Laura P. Howard, agreed and contracted with the said Laura P. Howard to safely carry and transport her over their said line of railway from the city of Louisville to the said city of Washington; and the plaintiffs say that the said Laura P. Howard, on the said 18th day of November, 1886, took passage on one of the defendant's passenger trains at Louisville for the city of Washington;"

7 "that at or near the town of Soldier, in the State of Kentucky, by the unskilfulness, carelessness, negligence, and

mismanagement of the defendant's agents in charge of the said train, and while the said Laura P. Howard was exercising due care and caution, the sleeping car in which the said Laura P. Howard was riding left the track and train and went down an embankment about thirty feet deep and was completely demolished."

2. The defendant says that at the time alleged it was not operating the said line of railway; that it was not a common carrier of passengers for hire between the said cities as alleged; that it did not agree and contract with the plaintiff as alleged; that she did not take passage on the defendant's passenger train as alleged, and that the plaintiff was not injured by the unskillfulness, carelessness, negligence, or mismanagement of the defendant's agents as alleged.

W. WILLOUGHBY,
Att'y for Defendant.

DISTRICT OF COLUMBIA, *ss:*

W. Willoughby, being sworn, says that he is attorney for the defendant; that he has made careful examination of the papers, records, and facts pertaining to the matters set forth in the above pleas signed by him as attorney, and that the allegations of facts as set forth which are within his personal knowledge are true, and those not within such personal knowledge he believes to be true, and that in his opinion the defendant has a good defense to this action upon the merits and sufficient to entirely bar the said action.

W. WILLOUGHBY.

8 Subscribed and sworn to before me February 4, 1890.

R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

Memorandum.

Feb. 15, '90.—Default set aside; leave to defendant to plead general issue.

9 *Plea of General Issue.*

Filed February 17, 1890.

Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE AND OHIO RAILWAY COMPANY. } At Law. No. 28242.

Plea of Defendant.

The defendant, not waiving its rights under former pleas tendered, by leave of the court, for its plea says that it did not undertake or promise in manner and form as the said plaintiffs have complained against it; and of this it puts itself upon the country.

W. WILLOUGHBY,
Attorney for Defendant.

Memorandum.

Feb. 25, '90. Motion to strike these pleas from the files granted by the court, and defendant ordered to plead the general issue.
M'ch 8, " Motion to strike pleas from the files withdrawn.
May 13, " Leave to plaintiff to amend declaration granted after hearing defendant's counsel in opposition thereto.

10 *Amended Declaration.*

Filed May 13, 1890.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA V. HOWARD, His Wife,
vs.
THE CHESAPEAKE AND OHIO RAILROAD COMPANY. } Law. No. 28242.

The plaintiffs, William Howard and Laura P. Howard, wife of the said William Howard, sue the defendant, The Chesapeake and Ohio Railroad Company, a foreign corporation, doing business within the District of Columbia, for that the defendant on, to wit, the 18th day of November, 1886, was and for a long time prior and subsequent thereto had been and *were* running and operating a line of railway between the cities of Louisville, in the State of Kentucky, and Washington city, in the District of Columbia, and upon said line of railway was a common carrier of passengers for hire; and on, to wit, the said 18th day of November, 1886, the plaintiff, the said Laura P. Howard, purchased from the agent of the defendant, at the said city of Louisville, a ticket entitling her to a passage upon the said railway from the said city of Louisville to the said city of Washington, and the defendant thereby became bound to safely carry and transport the said Laura P. Howard from the said city of Louisville to the said city of Washington; and on the day and year aforesaid, at the said city of Louisville, the said Laura P. Howard took passage upon one of the defendant's passenger trains for the city of Washington; and the plaintiffs say that the defendant did not carry and transport the said Laura P. Howard
11 safely, as it was bound to do, but that at or near the town of Soldier, in the State of Kentucky, by the unskillfulness, carelessness, and wrongful negligence and mismanagement of the defendant's agents in charge of the said train, the sleeping car in which the said Laura P. Howard was riding left the track and went down an embankment and was demolished, and the said Laura P. Howard was badly wounded, bruised, contused, and was especially hurt and injured in her spine, by reason of which she has been ever since sick, infirm, and crippled and most of the time confined to her bed, and she has been and is totally unable to do any kind of labor or work and has to be waited on and taken care of by

others, and she is advised that the injury to her spine is progressive and will be permanent, and she has no prospect of being anything but an invalid so long as she lives, and her life will probably be abridged by reason of her said injuries: and the plaintiffs say that prior to her said injuries the said Laura P. Howard was in excellent health and had a sound and vigorous constitution; that she at the time of receiving said injuries was — years of age; she was employed as a clerk in the Agricultural Bureau of the Government, at Washington city, and by reason of said injuries she lost her said office and has been deprived of the income and emoluments thereof, which, by the consent and agreement of her husband, she was entitled to have and enjoy for her own personal benefit, and she has suffered great pain of body and anguish and distress of mind ever since and on account of her helpless, diseased, and hopeless condition due to said injuries.

And the plaintiffs claim thirty thousand dollars damages.

S. S. HENKLE,
Attorney for Plaintiffs.

12 *Pleas of Defendant to Amended Declaration.*

Filed May 28, 1890.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE & OHIO RAILWAY COMPANY.	At Law.	No. 28242.

And now comes the defendant, by its attorney, and, not waiving its rights under former pleas, but insisting thereon, and excepting to the ruling of the court allowing the filing of the amended declaration and for its pleas to the amended declaration, says:

1st. That it is not guilty of the premises therein laid to its charge in manner and form as the said plaintiffs therein have complained against it, and of this it puts itself upon the country.

2nd. That the said defendant was not guilty of the said supposed grievances in the said declaration mentioned or of any or either of them at any time within three years next before the filing and exhibiting of the said amended declaration against the said defendant in manner and form as the said plaintiffs have therein complained against this defendant, and this the said defendant is ready to verify.

13 3rd. That after the said supposed committing of the grievances described in the said declaration and before the commencement of this suit, to wit, on or about the 24th day of November, 1886, there was paid to the said plaintiff, Laura P. Howard, the sum of $200.00, lawful money of the United States, in full satisfaction and discharge of the claim for the said grievances in the

said declaration mentioned, and which said sum of $200.00 was then and there accepted by said plaintiff in writing under her hand and seal in full satisfaction and discharge of the claim for said supposed grievances, and this the defendant is ready to verify. Wherefore it prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against this defendant.

W. WILLOUGHBY,
Attorney for Defendant.

Joinder of Issue.

Filed June 14, 1890.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE & OHIO RAILROAD COMPANY. } Law. No. 28242.

The plaintiffs join issue upon the defendant's pleas.

S. S. HENKLE,
Attorney for Plaintiffs.

14 *Memorandum.*

June 4, 1892.—Motion for leave to withdraw joinder of issue as to 2d plea and to strike said plea from the files.

15 *Memorandum.*

July 5, '92.—Leave to plaintiff- to withdraw replication to 2d plea and to demur in 10 days.

Demurrer to Second Plea.

Filed July 9, 1892.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE AND OHIO R. R. Co. } Law. No. 28242.

The plaintiffs say the 2nd plea is bad in substance.

S. S. HENKLE,
Att'y for Pl'ffs.

One of the questions I propose to argue is that the cause of action in the amended declaration is identically the same as that in the original declaration, with some verbal differences of statement only; that no new cause of action is introduced in the amended declaration.

S. S. HENKLE.

16 *Memoranda.*

Feb'y 4, '93.—Demurrer to 2d plea sustained.
May 18, '94.—Motion by defendant to set aside order sustaining demurrer to 2d plea overruled.
Nov. 30, '96.—Defendant's motion to set aside the order sustaining the demurrer to 2d plea again overruled.

Memorandum.

May 9, '98.—Verdict for plaintiffs for $30,000.00.

Supreme Court of the District of Columbia.

SATURDAY, *June* 25, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, Plaintiffs, *v.* THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant. } At Law. No. 28242.

This cause coming on for hearing on the motion for a new trial of defendant, and the same having been heard, it is considered that the same be, and hereby is, overruled and judgment on verdict ordered; therefore it is considered that the plaintiffs recover ($30,000) damages, as aforesaid assessed, together with their costs of suit, to be taxed by the clerk, and have execution thereof.

17 Appeal noted by defendant and penalty of supersedeas bond fixed at $40.000.

Appeal.

Filed June 27, 1898.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD & WIFE *vs.* THE CHESAPEAKE & OHIO RAILWAY CO. } At Law. No. 28242.

The clerk of said court will please note an appeal in the above-entitled cause and issue citation to the plaintiffs.

LEIGH ROBINSON,
Attorney for Defendant.

18 In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *v.* THE CHESAPEAKE AND OHIO RAILWAY COMPANY. } At Law. No. 28242.

The President of the United States to William Howard and Laura P. Howard, his wife, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 27th day of June, 1898, wherein The Chesapeake and Ohio Railway Company is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 29th day of June, 1898.

JAMES FRANCIS SMITH,
Attorney for Appellee.

19 Supreme Court of the District of Columbia.

FRIDAY, *July* 1, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

WILLIAM HOWARD ET UX., Plaintiffs, *v.* THE CHESAPEAKE & OHIO R. R. Co., Def't. } At Law. No. 28242.

Now again comes here the defendant, by its attorney, and presents to the court here its bill of exceptions taken during the trial of this cause and prays that it may be duly signed, sealed, and made part of the record now for then, which is done accordingly.

It is ordered that the time for filing the record in this cause in the Court of Appeals be, and hereby is, extended thirty days.

July 1st, 1898.

20 *Bill of Exceptions.*

Filed July 1, 1898.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD and LAURA P. HOWARD, His Wife, *vs.* THE CHESAPEAKE & OHIO RAILWAY CO. } At Law. No. 28242.

Be it remembered that on the — day of May, 1898, the above-entitled cause came on for trial before Mr. Justice Cole and a jury. Thereupon, as tending to prove the issues on their part joined, the plaintiffs' counsel called LAURA P. HOWARD, who testified that her husband was William Howard, and that he and the witness are the plaintiffs in this case. In the year 1886 her home was in Jeffersonville, Indiana, she herself being employed here in the Agricultural Department. In Sept., 1886, she returned to her home to spend her vacation with her husband. After a stay of two months she started from Jeffersonville, which is just opposite Louisville, and at Meader's ticket office, which is in the last-named city, bought a ticket on the C. & O. road and started for Washington. When she first came to Washington, a year before, she had taken the C. & O. road, and when she returned to her home in September she had done the same. Her ticket was a Chesapeake and Ohio Railway ticket and read from Louisville to Washington. Her trunk was checked with a Chesapeake and Ohio Railway check. The train left First St. station, Louisville, Kentucky, at 7.30 p. m.

The ticket was stamped with the name of the Chesapeake and Ohio railway.

21 Q. To what station did you go to take the train? A. First Street, Louisville, Kentucky.

Q. Did you take the train? A. Yes, sir.

Q. In that station? A. Yes, sir.

Q. What, if anything, did you see in connection with the train? A. When I went to get on the train I saw the card of the Chesapeake and Ohio train.

Q. Did you take that train? A. I did.

Q. Where did you go in that train? A. I went into the sleeper.

Q. About what time of the afternoon was that? A. That was in the evening, about seven o'clock.

Q. What time did you go to bed in your berth in the sleeper? A. About eight or nine o'clock.

She went to bed in her berth, having first given her ticket to the conductor. She was awakened by the jerkings of the car which went over an embankment about thirty feet deep; she was thrown out of the sleeper on the floor. The car was broken all to pieces. The partitions in the car were broken. She was taken out of the car by five gentlemen, who held her up while three outside of the car took her out of the window. The car had fallen into the

bed of a creek which happened to be dry. She was taken to a cottage by the wayside, and after she and others had dressed a train was fixed up for them, and they went on their
22 journey. After she had been on the train a little while the conductor came to her and said they had sent up the road for Dr. Brock (who was on his annual tour); that the Doctor had come, and that he (the conductor) would lead her to the Doctor's car. The Doctor made an examination of her, and with the aid of Mrs. West, one of the ladies, showed her a black spot at the end of the spine. Dr. Brock said to all of us in the sitting-room that he was chief surgeon of the corps of surgeons of the Chesapeake and Ohio railway. To the question, Did he say anything further at that time of any importance to you? Ans. "No, sir; nothing special that I remember." She was given a berth in a sleeper and came on to Washington, D. C., where she was taken to Mrs. Warder's, 1806 11th St. Before leaving Louisville she exhibited her ticket to a Mr. Walter Morgan, a friend, who came to say good-bye to her, saying, "It is the first time I ever bought a scalper's ticket. I wonder if it will take me through all right?" He said, "Yes." In Washington, at Mrs. Warder's, she was suffering from her spine, and was attended by Dr. Hamilton Leech, who is now dead. A few days after the accident Mr. Frank Trigg called upon her to ask her about the extent of her injuries. I told him as well as I could. I was very sick and hardly able to talk, and I think he said he would send Dr. Brock. After that Dr. Brock came. He said he was sorry to see her so ill; that the company had sent her two hundred dollars to take care of her until she got up. My room was dark; it was kept dark. She said, "Dr. Brock, I feel very bad; I am afraid I will lose my position." He said, "Oh, well; if you do we will see you through." The company will see you through. Dr. Brock paid her two hundred dollars.
23 Q. Did he say from whom that money came? A. From the company.

Q. Did he say from what company? A. I suppose it was the company of the Chesapeake and Ohio railway—the company on whose road I was hurt.

Q. You have said that he said when he first saw you he was the surgeon of the Chesapeake and Ohio Railway Company? A. Yes, sir.

Q. In this second interview, when he paid you the money, did or did not he say anything about the company? A. I don't know that he gave any name. It was sent to me by the company, and I met him on the Chesapeake and Ohio road, and knew that he was the surgeon of the Chesapeake and Ohio road.

Q. Did he give you any paper to sign? A. He did.

Q. Did you read the paper before you signed it? A. I did not. I couldn't have read it to save my life. I was very ill.

Q. What was your condition at the time? A. I had been awake all night and was very ill. Mrs. Warder and her daughter and her servant had been taking care of me. I had had a fearful headache and could then hardly speak.

Q. Have you seen that paper since, except at the last trial? A. I have not.

Dr. Leetch did not tell her what disease she was suffering from, but advised her to go to New York and there consult the "best surgeon I could get." I went to New York and consulted
24 Dr. Chrystie, an eminent specialist for spinal diseases, under whose treatment she had been ever since. After this she returned to her home in Jeffersónville, but the greater part of the time since her injury she had spent in New York. Dr. Chrystie made an instrument or brace, which he put on my body, and I have it on today. I have had it on ever since. I could not even sit up without wearing it. If I take it off I fall over and cannot stand erect. I wear it all the time; it is made of steel. The Doctor had it made under his own supervision.

In March, 1887, Doctor Meredith Clymer came to see her to examine her. Doctor Christie asked her to have Doctor Clymer come for that purpose.

Dr. Bogan attended her about four years whenever she came to Washington. When she was at home in Jeffersonville she had Dr. Field.

On cross-examination the witness stated that Indiana was her home, the place of her birth and of her marriage. When she looked at the papers in Louisville she had looked to see the time of the departure of the trains, not because she had any doubt that a train continued to leave Louisville for Washington. Dr. Brock did not read to the witness the voucher which she signed, nor did she read it herself. "I could not have read it to save my life." Witness again said Dr. Brock told her, if she lost her office, the company would see her through.

On redirect witness stated she came to Washington in 1885, when she received her office, and from 1885 to 1898 had lived principally in New York and at home. She came to Washington this year in January, 1898, and had remained here; the year before she
25 had been here two or three months, and the year before probably a month. The witness had come to Washington over the C. & O. since the accident. "If I have to go alone I prefer the Chesapeake and Ohio, because it goes through without change of cars."

Q. You say you went to the scalper's office and asked for a ticket on the Chesapeake and Ohio railroad? A. Yes, sir; I wanted one specially on that road.

Q. Why did you want one specially on that road? A. Because I could come through without change of cars.

Q. When you picked up the paper and looked at the advertisement here do you recollect what paper it was? A. The Louisville Courier-Journal.

Q. For what advertisement did you look? A. The Chesapeake and Ohio road.

Q. What advertisement did you find? A. The Chesapeake and Ohio.

My condition is anything but improving. The disease is evi-

dently progressing because I cannot sit up as long. I cannot walk any distance. I can hardly ride in the street car without great suffering. I suffer in various ways a great deal with my head and continually with my spine. I am never free from pain in my back here. The suffering in my head is all at the base of the brain, and if I want to see anything back of me I have to turn my entire body; I cannot turn my head either way. The slightest exercise makes it worse. My stomach is also affected; I have to be very careful what I eat; I have to have food specially prepared for me. Before I was hurt I never had a physician in my life; I never had a prescription filled and do not remember ever to have taken any medicine; my health was absolutely perfect up to the time I was hurt; now
26 I have to live like a child, like you would feed a child that was diseased or sick. I have to have very light food; I cannot eat meat. I have been under Doctor Christie's care most of the time during the past eleven years. I was there eight months first; then I went back and I was there three years. Doctor Bogan has attended me about four years. Whenever I come to Washington I have Doctor Bogan. When I am at home I have Doctor David Field. I have a physician all the time. I never sleep any longer than twenty minutes. I have to change my position. I have to have three or four pillows to fill up and put around me in order to make myself comfortable at all. I wear the brace all the time; I have to sleep in it.

And, further to maintain the issues on their behalf joined, the counsel for the plaintiffs called GEORGE W. TALBERT, who testified that he knew the late Mr. Frank Trigg in 1886 and knew him in 1886 as local agent of the Chesapeake and Ohio railway; had occasion to see him in November or December, 1886, and did see him at the corner of 6th St. and Pennsylvania avenue, in the city of Washington, D. C.

Q. Do you know whether or not that was the office of the Chesapeake and Ohio railway? A. The sign over the door, sir, read that.

Witness went there in relation to the settlement of a claim for injuries sustained by his brother-in-law's wife on the Chesapeake and Ohio railway, coming from Louisville to Washington, about the middle of November, 1886, when the sleeping car ran off the embankment. Witness saw Mr. Frank Trigg with reference to that business, who responded to it. The sign which was then over the office at the corner of 6th and Pennsylvania avenue is there yet.

27 And, further to maintain the issues on their part joined, the plaintiffs, by their counsel, read the deposition of GEORGE W. GILLESPIE, taken on behalf of the defendant. Witness resided (April 4th, 1893) in Huntington, West Virginia, and at the date of deposition was wrecking boss of the C. & O. (a contraction of Chesapeake and Ohio railway, used for convenience in this bill of exceptions); had been engaged in various mechanical employments since April, 1865. In 1883 was made foreman of the wrecking force. When the wreck occurred at Soldier, Kentucky, Mr. Smith,

the master mechanic, sent for him and others to go there. He found the Piedmont Air Line car on the bank at the end of the trestle, both platforms broken off, windows broken. "The Pullman sleeper was laying down there, kinder mashed together somewhat in a diamond shape, the windows all broken. Well, it was pretty badly broken up." "We then went looking around to see if we could see what caused the accident." Went up the track some distance, but could not find anything wrong with the track until he came down to the frog and a little east of the frog; saw where the flange had struck the rail as it came around. Then came down the track, looking; examined the trucks carefully. The broken flange was the only thing he could see. "I had to give in my reports as to the cause of the accident; it was a broken flange. I examined the track carefully, and must say that I certainly know a good piece of track when I see it."

Q. Was that a good track at that place? A. Yes, sir.

Q. Did you make a close examination of the break in that wheel to see whether or not it was a fresh break or an old crack?

28 A. It was a fresh break, sir.

Q. You were then thoroughly satisfied at the time and are still thoroughly satisfied that the cause of the car leaving the track was the breaking of that flange? A. Yes, sir; no other cause could I find; no other grounds could I find to try to build any other cause on. The place of the wreck was a four-degree curve, not over five.

Q. What road or company was operating the E., L. & B. S. R. R. in November, 1886? A. It was operated by the Newport News and Mississippi Valley Company; it was in that system at that time.

And, further to maintain the issues on their part joined, the plaintiffs, by their counsel, read in evidence the deposition of J. D. YARINGTON, taken on behalf of the defendant. Witness resided, March 24th, 1893, about three and a half miles from Lexington, Kentucky, and in November, 1886, was engaged in railroading.

Q. On what railroad and in what capacity? A. Elizabeth, Lexington and Big Sandy railroad, and I was superintendent of the division, operated at the time, I believe, by the C. & O. Railway Company.

Q. Do you mean to say that it was being operated by the C. & O. Railroad Company or by the N. N. & M. V. Co.? If you cannot state positively, give your best impression. A. I am not clear as to which.

Witness was present shortly after the accident that occurred to the train at Soldier, Kentucky, on the night of November the 16th or morning of the 17th, 1886, and made an examination of the trucks and coaches, was satisfied that a broken wheel caused the accident, and saw afterwards a piece of a flange of a wheel

29 which corresponded with the break he discovered in the wheel. "I was satisfied at the time it was a fresh break and am still satisfied that it was a fresh break."

Q. What was the condition of the road-bed at the point where this accident occurred? A. In perfect order.

On cross-examination witness stated:

A. It was my decided opinion and still is that the accident was caused by the broken flange of the wheel.

Q. Might not the rails at that point have been spread and the train thereby thrown from the track and thus have broken the flange? A. The rails were not spread at that point where the marks first appeared on the ties. I put a gauge on the track at that point and if the rails had been spread it would have been plainly seen.

Q. Is it not unusual for a wheel to break in this manner? A. I should say so.

And, further to maintain the issues on their part joined, the plaintiffs, by their counsel, read in evidence the deposition of JOHN HURST as follows:

Witness resides in Clarksville, Tennessee. On the evening of November 16, 1886, witness left Louisville for Philadelphia; accident occurred about two o'clock that night; thinks reckless running caused the accident and possibly a damage to the car when we left Louisville. "We left Louisville between seven and eight o'clock and before we had gotten out of the yard the car had gotten off the track, and I heard that something was the matter with the spring or possibly the wheel." We heard this either from the porter
30 or sleeping-car conductor. Somewhere east of Lexington he was awakened by the vibrations of the car, which was running at a very rapid rate of speed, and a moment or two after this the car jumped the track and went over the trestle, completely crushing the back end of the car. Saw Mrs. Howard; she was injured some way in the back. She was complaining very much, and Dr. Brock, chief surgeon of the C. & O. R. R., told me she was injured in the back. Witness took the train at Louisville; bought the ticket uptown at the general office—the city office—"but I don't remember what road issued it, though my recollection is it was either the Chesapeake and Ohio or the Newport News and Mississippi. I don't remember which. The route was called the Chesapeake and Ohio. When the accident occurred Dr. Brock, who told me he was chief surgeon of the C. & O. road, was between where the accident occurred and Huntington with some officials of the railroad. He attended to our injuries until we got to Charlottesville, Virginia, and he took the names of the different passengers. After I got to Philadelphia he called to see me and asked me what I would take to compromise my injuries, and I told him I would charge him nothing except my doctor's bills and loss of time. He took the money out of his pocket and paid me $140 or $150, and I gave him a receipt for the money.

And, further to maintain the issues on their part joined, the plaintiffs, by their counsel, read in evidence the deposition of DAVID THORBURN. Deponent is a native and resident of Sweden, who has since returned to that country; is a civil engineer and managing director of the —— Railroad Company; was on the train on which

the accident occurred, having started on November 16th, 1886,
31 from Cincinnati for Philadelphia. I travelled on the C. &
O. R. R., but when I got on this road or how long I travelled on it I am unable to state; my destination was Philadelphia.

Q. Over what line did your ticket call for? A. I do not remember. Mrs. Howard was in the sleeper which fell down from the bridge. The sleeper fell completely upside down before striking the ground; was surprised that all of the passengers in the car were not killed. Mrs. Howard seemed to be very much stunned by the shock. As to the cause of the accident, I was asleep at the time, and can't state positively, but my full impression at the time was and at this moment is that the accident was caused by the first truck of the second smoker leaving the rails on account of reckless running, and the broken spring in the car just preceding it also had a part in the cause. The viaduct was from ten to fifteen feet high, according to the impression of the witness. After leaving the place of accident he travelled, together with Mrs. Howard, about twenty-four hours. During this time heard her complain of feeling ill from the shock several times. "She left the car at Washington, D. C., I believe, but I and some of the other passengers went to Philadelphia."

And thereupon, to further maintain the issues upon their part joined, the plaintiffs call- Doctor SAMUEL W. BOGAN, who testified that he is a practising physician in Washington; first saw Mrs. Howard professionally in May 1894; found her in bed suffering from intense neuralgia of the stomach, head, sides, and back. She suffered a great deal from congestion—that is, from increased flow of blood to the brain—the effects being blindness, giddiness, and
intense pain over the eyebrows. That attack lasted two
32 weeks, and he saw her every day; has attended her constantly since then, principally for the results of the injury she received. The disease she suffered from is known as Potts' disease of the spine, which consists in a rotting really of the bones of the spine. The decayed bones work out of the system by means of abscesses, which have to be cut open. She suffers from dyspepsia almost constantly, and has to be dieted very strictly. She is at this time losing the power of the left limb. Since he became acquainted with her case Mrs. Howard has slowly gotten worse. The disease is incurable. She suffers as if she had a constant toothache.

The court and jury retired to the judge's room, where Mrs. Howard was exhibited before the jury wearing the apparatus referred to, and Doctor Bogan explained to the jury the different parts of this apparatus and the functions that they serve.

And thereupon, further to maintain the issues on their part joined, the plaintiffs called MARY ELEANOR WARDER, who testified that Mrs. Howard was brought to her house, 1806 Eleventh street northwest, from the train after the accident to her in 1886. Mrs. Howard remained at her house for about a month after the accident. During that time she was badly hurt and very feeble. She had to have attention all the time from the doctor. She suffered very much,

mostly in her back. I saw her back the next morning after she was brought to the house. There was a large bruise on it, very black. It was larger than my hand. She could not walk then. She wears a brace now, and I suppose that supports her so that she can walk, but at that time she could not walk at all. Doctor Leech was the doctor who attended her at that time. He is now
33 dead. Mrs. Howard went from my house to New York to see Doctor Christie.

And thereupon, further to maintain the issues on their part joined, the plaintiffs called Doctor THOMAS M. LUDLOW CHRYSTIE, who testified that he is a physician residing in New York city and a specialist in spinal diseases. Mrs. Howard placed herself under his treatment early in 1887, and has been under his treatment ever since. She is suffering from an incurable spinal affection which is progressive, occasioning great suffering and almost total disability. During the first part of this treatment she was in New York under his care for the greater part of the time. During the subsequent years she came there about once or twice a year. Witness had contrived and made for her an apparatus grasping the hip and extending up to the shoulders and giving support in front, which steadies the back as a broken bone would be steadied, and gives her partial relief, but the disease is located so low down, so much superincumbence of weight from above, that it does not give her complete relief. It is made of steel and should be worn constantly. She should sleep in it. It is necessary for her to wear it for her comfort as well as for the protection of her backbone. The disease has progressed slowly. If it had not been for this spinal assistant I think she would have had complete paralysis.

And thereupon, further to maintain the issues on their part joined, counsel for the plaintiffs read in evidence the deposition of WALTER C. MORGAN, who testified that in 1886 he lived at Louisville, Kentucky, and was employed by the Pennsylvania R. R. Co. as ticket-receiver. His duties were to take charge of the conductors' collections, both tickets and cash. Witness knew the plaintiff
34 Mrs. Howard and saw her on November 16th, 1886. Mrs. Howard, on the morning of that day, showed witness a ticket which she had purchased for transportation from Louisville to Washington. It was a Chesapeake and Ohio ticket. It was the return portion of a ticket sold in Washington, good for transportation between Louisville and Washington. The ticket purported to be issued by the Chesapeake and Ohio Railway Company, as appeared on its face.

And next counsel for plaintiff- gave in evidence the deposition of FRANK L. OLMSTEAD, taken the 11th day of April, 1894. Deponent was manager of Meader's ticket office in November, 1886. On Nov. 16th, 1886, sold Mrs. Howard a ticket to Washington city for $16.50. Witness knew Mrs. Howard, he presumes, at the time he sold the ticket, but would not know her now if he met her on the street.

Q. Will you please describe the ticket you sold Mrs. Howard?

A. I know it was a regular issue, but as to describing the ticket I can't do it.

Q. On what road was the ticket sold her? A. As we named the road when we sell a ticket, it was Chesapeake and Ohio or whatever road it might be. This ticket was Chesapeake and Ohio.

Q. Was that road at that time regularly selling tickets of the same description? A. I am almost positive they were.

Q. What route was this road known as to the public at that time? A. Chesapeake and Ohio.

Cross-examination:

35 Meader's ticket office was a railroad ticket broker's office. This was the only ticket I sold to Washington by the Chesapeake and Ohio on that day. It is from this circumstance that witness is able to state that the ticket described is the one he sold to Mrs. Howard. The form of the ticket was 7 58 C., No. 84.

Q. How did the ticket read—I mean what name appeared at the head of the ticket? A. That I do not remember.

Q. If any, how many coupons were on that ticket? A. I think three; possibly two.

Witness was able to testify as to the form of the ticket by reference to the "blotter" or daily record kept by the office of every ticket bought and sold each day. The entry in this blotter or day book was: 1 Washington via C. & O.; form & number and amount for which the ticket was sold.

Q. Where was the C. & O. railroad ticket office in the city of Louisville in November, 1886? A. I think on 4th street.

Q. Who was the agent who sold the tickets? A. I think it was Mr. Charlie Beutanbach.

Q. From whom did you or Mr. Meader purchase this ticket you sold Mrs. Howard? A. That I cannot answer correctly.

Q. Where did you usually buy these tickets? A. Different places.

Q. Where in the State of Kentucky was there such a road as the C. & O. and where was its western terminus and where was its eastern terminus? A. Well, I will have to refer back to ascertain that. The names of those roads were changed so often that I didn't keep track of them. The Western division terminated at Memphis and the C. & O. Eastern division terminated at Washington,
36 although I think they ran over another road from Charlottesville into Washington, although we termed it the C. & O. route.

Q. Is that what you term the Chesapeake and Ohio route? A. I do.

Q. Where was the Eastern division in the State of Kentucky of the Newport News and Mississippi Valley Company? Where was its western and where was its eastern terminus in November, 1886? —. I presume where it is now, from Lexington to Huntington or Ashland, but we call that Chesapeake and Ohio, and Chesapeake and Ohio tickets were good over that part of the road as they are now (April 11, 1894).

Redirect:

Q. I understood you to say, when asked, that this was a regular issue Chesapeake and Ohio ticket, and your understanding was, so far as these other roads that have been mentioned are concerned, that the C. & O. Company had some sort of arrangement for running over them? A. Yes, sir.

Q. But you do not know what the arrangement was? A. I do not.

And, further to maintain the issues on their part joined, the plaintiffs, by their counsel, called HENRY W. FULLER, who testified as follows: The present position of witness is that of general passenger agent of C. & O. system, and by his authority was inserted an advertisement, which was shown him, in the Louisville Courier-Journal of November 13th, 1886, and by his authority also was inserted the advertisement just above it in the same paper of the Newport News and Mississippi Valley Co. These two advertisements are as follows:

37 Chesapeake and Ohio railway; only line running solid trains between Louisville and Washington city; depot, Water street between First and Second; ticket office, 225 Fourth avenue; central standard time; in effect September the 30th, 1884.

East bound.	Fast line, daily.	Va. Springs local ex., D ex. Sun.
Lv. Louisville	7.35 p. m.	12.32 a. m.
Ar. Lexington	10.25 p. m.	4.55 a. m.
Ar. Huntington	4.00 a. m.	5.50 a. m.
Ar. Charleston	6.28 a. m.	7.02 a. m.
Ar. Kanawha Falls	8.00 a. m.	7.40 a. m.
Ar. Alderson	11.14 a. m.	7.00 a. m.
Ar. White Sulphur	12.05 p. m.	11.35 a. m.
Ar. Covington	1.03 p. m.	7.15 p. m.
Ar. Clifton Forge	1.30 p. m.	10.44 p. m.
Ar. Goshen	2.47 p. m.	9.03 p. m.
Ar. Staunton, Va	3.57 p. m.	10.26 a. m.
Ar. Waynesboro	4.22 p. m.	10.57 a. m.
Ar. Afton	4.30 p. m.	11.10 a. m.
Ar. Charlottesville, Va	5.30 p. m.	12.05 p. m.
Ar. Washington	9.50 p. m.	
Ar. Baltimore	11.35 p. m.	
Ar. Philadelphia	3.00 a. m.	
Ar. New York	6.30 a. m.	
Lv. Charlottesville	5.30 p. m.	12.10 p. m.
Ar. Richmond	8.30 ——.	4.05 p. m.
Ar. Newport News	10.45 a. m.	7.00 p. m.
Ar. Old Point Comfort	11.10 a. m.	7.30 p. m.
Ar. Norfolk	11.45 a. m.	8.00 p. m.
38 Ar. Lexington	7.10 p. m.	5.20 p. m.

The fast line leave- Louisville with Pullman cars and solid trains to Washington, D. C., without change, connecting in Union depot for Baltimore, Philadelphia, New York, and the East.

Philadelphia passengers can remain in sleepers until 7 a. m.

Direct connection for all points in the Virginias and Carolinas.

Newport News and Mississippi Valley Company.

Western division Chesapeake, Ohio and Southwestern R. R.

In effect June 6th, 1886.

Solid trains and Pullman sleepers for Memphis and New Orleans, connecting with all points southwest.

Ticket office, 225 Fourth avenue; depot, corner of Fourteenth and Main streets.

Stations.	Fast line, daily.	Mail, daily.
Leave Louisville	8.35 p. m.	12.32 p. m.
Arrive Cecilian	10.32 p. m.	10.45 a. m.
Arrive Elizabethtown		11.25 a. m.
Arrive Central City	1.29 a. m.	2.30 p. m.
Arrive Nortonville	2.30 a. m.	3.40 p. m.
Arrive Madisonville		4.40 p. m.
Arrive Henderson		6.00 p. m.
Arrive Paducah	5.30 a. m.	7.25 p. m.
Arrive Fulton	7.45 a. m.	9.47 p. m.
Arrive at Rives	8.20 a. m.	
39 Arrive Memphis	1.30 p. m.	
Ar. New Orleans	8.30 a. m.	
Arrive Mobile	7.40 a. m.	

The fast line has Pullman sleepers . New Orleans and is solid train to Memphis.

Accom-odation leave- daily, except Sunday, at 3.30 p. m. from Fourteenth and Kentucky Sts.

Fast line arrives at Louisville at 2.45 a. m.

Mail line arrives at Louisville at 6.35 p. m.

Accom-odation arrives at Louisville at 9.10 a. m.

Witness could not remember how long those two advertisements had been inserted nor how long they continued.

Q. I will ask you whether or not you inserted a single advertisement or whether they were continued. A. They were continued; usually made by the year. We usually pay by the year and change them when we change the schedules, as a rule.

Another advertisement which was shown the witness in the Washington Post of November the 15th, 1886, was also published by his authority. A similar advertisement appears in the Washington Post of July 1st, 1886, and presumptively continues to and through November 26th, 1886; said advertisement is as follows:

Chesapeake and Ohio railway.

Leave B. & P. depot, Sixth and B streets, 10.05 a. m. for Newport News, Old Point Comfort, and Norfolk daily except Sunday.

40 11.15 a. m. for all the Virginia springs and the West. Solid train with Pullman sleepers to Louisville; Pullman service to Cincinnati and St. Louis; fast express daily.

For tickets and information apply at C. & O. Railway office, 513 Pennsylvania avenue, and B. & P. station.

H. W. FULLER,
Gen. Pass. Ag't.

Witness was then shown a folder marked 18, J. T. T., and stated that said folder was made and promulgated by his authority; that 200,000 were printed a year for the purposes of circulation. The plaintiffs' counsel then offered and gave in evidence said folder and described to the jury the map upon said folder, being the same annexed hereinafter to Mr. Wickham's deposition. The witness stated that the present office of the C. & O. railway is at the corner of 6th St. and Pennsylvania avenue, where it has always been.

Q. What sign was there in November, 1886? A. I could not answer. I presume "Chesapeake & Ohio railway."

Q. Has not such a sign been there always? A. I presume so, for we have always used that as a trade-mark.

The date of the folder is November 21st, 1886. Witness could not say positively, but thinks a similar one had been issued in October, 1886; such folders are usually issued monthly.

On cross examination the witness stated that in November, 1886, he was the general passenger agent of the Newport News and Mississippi Valley Company.

Q. Were you at that time the agent or representative of the
41 C. & O. Co.? A. No, sir; I did not understand that I had any connection with it.

Witness was then shown the advertisement in the Washington Post for November 27th, 1886, and said that the same was inserted by his authority, and the same was then read to the jury. A similar proof was made of an insertion in the Louisville Courier-Journal of December, 1886, and the same was read in evidence.

Chesapeake and Ohio route.

Newport News and Mississippi Valley Company.

Union depot, Sixth and B Sts.

11.00 a. m. for Newport News, Old Point Comfort, and Norfolk; daily except Sunday; arrive Norfolk 7.00 p. m.

9.00 a. m. for all points on the Chesapeake and Ohio and points West; sleepers from Clifton Forge; daily except Sunday.

5.30 p. m., fast western express daily; solid train with Pullman sleepers to Louisville.

Pullman service to Cincinnati and St. Louis, Memphis, and New Orleans.

Apply at C. & O. Railway office, 513 Pennsylvania avenue, and B. & P. station.

H. W. FULLER,
General Passenger Agent.

FRANK TRIGG,
Gen. N. E. Pass. Agent.

42 Newport News and Mississippi Valley Co., Chesapeake and Ohio route, new union depot, Seventh and Water streets; in effect Nov. 21, 1886; east 7.30 p. m.

Fast express daily for Staunton, Charlottesville, Richmond, and Virginia cities, Washington, Baltimore, Philadelphia, and New York; solid train with Pullman sleeping cars to Washington.

NOTE.—An additional train (the through mail) leaves First and Water Streets depot daily, except Sunday, 6.50 a. m. for all stations; direct connection for Washington, Baltimore, Philadelphia, and New York; south 8.35 p. m. daily for Memphis, Vicksburg, New Orleans, Little Rock, and Southwest; Pullman buffet cars to New Orleans without change.

9.00 a. m. daily for Paducah and Fulton.

3.25 p. m. daily, except Sunday, Elizabethtown accommodation.

Arrivals: 7.15 daily from Richmond, Washington, and the East.

10.30 a. m. daily from Memphis and New Orleans.

6.00 p. m. daily from Paducah and Fulton.

9.25 a. m. daily, except Sunday, Elizabethtown accommodation.

Ticket office, 225 Fourth avenue.

By Mr. PERRY.

Redirect examination:

Q. You have testified in answer to a question by Mr. Robin-
43 son that at the time you inserted these advertisements, which I call your attention to, in the Post and in the Louisville Courier-Journal, you were not the agent of the Chesapeake and Ohio railway, but were the agent of the Newport News and Mississippi Valley Company? A. Yes, sir.

Q. When did you first become the agent of the Chesapeake and Ohio Railway Company? A. A long time ago; so long ago I am trying to get back there. It was fifteen years ago last June; fifteen years ago the first of next month; fifteen or sixteen.

Q. Where was your office at that time? A. Richmond; the first office was in Richmond, Virginia.

Q. When did the Chesapeake and Ohio railway first come to Washington? A. About four years ago. We are not here practically as a corporate line. We are here merely by traffic contract.

Q. When did the Chesapeake and Ohio Railway Company first open an office in Washington? A. Within two or three years after my connection with the road. I do not remember it.

Q. That would bring it about 1884 or 1885? A. 1884, or somewhere along there. 1884, I should say.

Q. And it had its office at this place, Pennsylvania avenue and Sixth street? A. Ever since it came here; yes, sir.

Q. What position did you have at that time? A. I have always been general passenger agent, sir; was at that time of the Chesapeake and Ohio railway.

Q. When first did any change occur with reference to the
44 office of the Chesapeake and Ohio railway in Washington?
A. Well, the office had never been changed; the location of the office, I mean, has never changed.

Q. When did you first cease to be the agent of the Chesapeake and Ohio Railroad Company? A. 1886.

Q. At what time? A. At the time the Chesapeake and Ohio railway was leased to the company that was formed for the purpose of operating all Mr. Huntington's lines, the Newport News and Mississippi Valley Company, Eastern division.

Q. What did you become then? A. General passenger agent of the Newport News and Mississippi Valley Railway Company, Eastern division, and the Newport News and Mississippi Valley Railroad Company, Western division. There were two divisions.

Q. Just previously you had been the passenger agent of the Chesapeake and Ohio Railway Company? A. Of the Chesapeake and Ohio and of three or four other roads.

Q. And then after the change in 1886 you became the general passenger agent of the Newport News and Mississippi Valley Company? A. Yes, sir.

Q. Who was president of the Chesapeake and Ohio immediately previous to the change? A. C. P. Huntington.

Q. Who was president of the Mississippi Valley? A. C. P. Huntington.

Q. The other officers, the officers of the two roads, were generally the same, were they not? A. Yes, sir; generally the same, except the transportation officers.

Q. How did it happen that the Newport News and Mis-
45 sissippi Valley Company permitted you in November, 1886, to insert this advertisement in the Courier-Journal and in the Washington Post as the general agent of the Chesapeake and Ohio road? A. We always used "Chesapeake and Ohio railway." It is simply a trade-mark. We might as well advertise the P. D. Q. route as the Newport News and Mississippi Valley Company. The public would not know where it was located or how to get there.

Q. In point of fact, what you call the Newport News and Mississippi Valley Company did permit you to insert this advertisement, did they not? A. There was no especial conversation about it; that was left for me to decide.

Q. You would not do a thing that you had not authority to do,

would you? A. I have authority to do pretty nearly as I please in connection with these matters—advertisement and that sort of thing. I am absolutely chief.

Q. You had that authority from the Newport News and Mississippi Valley Company, did you? A. Yes, sir; I had that authority; not specially; that was never questioned.

Q. A general authority? A. To that effect.

Q. What railroad operated the Elizabethtown, Lexington and Big Sandy in the early part of 1886? A. The E., L. & B. S. road was leased to the Newport News and Mississippi Valley Company, Western division, early in the year. I think it was in January, 1886.

Q. Immediately prior to that lease what road was oper-
46 ating the Elizabethtown? A. Always the E., L. & B. S.

Q. Is it not a fact that the Chesapeake and Ohio operated it? A. No, sir; the Chesapeake and Ohio never operated it to my knowledge.

Q. Didn't you testify at the former trial that it did? A. I testified on the former trial as I testify now. If you ask the question that the traffic officials, myself, for instance, as a traffic official, having charge of the passenger business operated over all these different lines, and that my salary was proportioned out among the different roads, always reporting, however, to the president of the company—the several companies.

Q. Is it not a fact that you testified at the former trial that the Chesapeake and Ohio railroad operated the Elizabethtown, Lexington and Big Sandy railway immediately prior to the alleged lease from that road to the Newport News and Mississippi Valley Company? Didn't you testify that on the former trial. A. I will answer that question directly. The record will show what my testimony was.

Mr. ROBINSON: Suppose the testimony be read to the witness.

Mr. PERRY:

Q. Mr. Fuller, have you ever seen any of the capital stock of the Newport News and Mississippi Valley Company? A. No; I never have.

Q. Where did the Newport News and Mississippi Valley Com-
pany get its rolling stock from? A. It was contributed by
47 the various lines that were leased to this company and by the Chesapeake and Ohio. Do you desire me to designate the different roads?

Q. Yes. A. The Chesapeake and Ohio, the E., L. & B. S., and the Chesapeake and Ohio and Southwestern.

Q. Is the Newport News and Mississippi Valley in existence now? A. I think not, sir.

Q. What became of the rolling stock of the Chesapeake and Ohio Railway Company upon the going out of existence of the Newport News and Mississippi Valley Railway Company? A. It is rather out of my department, but I think I can testify that it was turned

back to the original companies from which it was received; naturally would be.

Q. That is, the Chesapeake and Ohio Company transferred all of its rolling stock over to the Newport News and Mississippi Valley Company? A. Yes, sir.

Q. And then the Newport News and Mississippi Valley Company turned it back? A. Yes, sir; after the Chesapeake and Ohio went into the hands of a receiver and was taken out of the combination it received its rolling stock back, I think.

Q. When the Chesapeake and Ohio Railroad Company went into the hands of a receiver, did not the Newport News and Mississippi Valley Company turn over all the rolling stock it had gotten from the Chesapeake and Ohio? A. I think that the investigation is getting to a point where I am not able to answer of my own absolute knowledge on those matters. It is not connected with my department at all, and I do not feel competent to answer.

48 Q. What property did the Newport News and Mississippi Valley Company have of itself at all? Do you know of any that it had? A. Prior to the acquirement—that is, originally?

Q. Yes. A. No, sir; I do not know of any property that it may have had.

Q. Do you know of a single locomotive that it had of its own? A. Prior to the organization of the company? No, sir. It was like all other charter companies, I suppose; had nothing until it purchased something.

Q. Do you know where it was organized; in what State? A. Yes, sir; I happen to know that it was under a Connecticut charter, I am quite sure.

Q. Did it have a mile of track anywhere? A. I don't think it had anything prior to the charter. I never knew a railroad company that had anything prior to its charter.

Q. You have known of some railroad that built roads, have you not? A. Yes, sir.

Q. What track did the Newport News and Mississippi Valley Company ever build? A. It had none. The company was organized for the purpose of leasing railroads and forming a combination.

Q. I suppose you cannot tell for what purpose it was organized? Probably C. P. Huntington could tell that? A. No, sir; I would be filling a different position if I knew that.

49 During the redirect examination, in answer to a question of defendant's counsel, witness stated that these different companies contributed the rolling stock for a consideration, of course; that the rolling stock went into the organization, just as the rails and right of way did, for a consideration.

And thereupon, further to maintain the issues on their part joined, the plaintiff-, by their counsel, read in evidence the deposition of H. T. WICKHAM. Witness is a lawyer and director and general solicitor of the Chesapeake and Ohio Railway Company; entered the service of the company in 1874; in January, 1886, was

appointed general solicitor, and was made a director in 1888. The C. & O. Railway Company at the date of his testimony extended from Fortress Monroe, Virginia, to the west bank of the Big Sandy river, a stream dividing the States of Kentucky and West Virginia. Soldier, the place at which the accident to the plaintiff happened, is a station on the line of the Elizabethtown, Lexington and Big Sandy railroad, in Carter county, Kentucky, about fifty or sixty miles west of the Big Sandy river. The E., L. & B. S. Co. is a corporation duly chartered, organized, and existing under the laws of the State of Kentucky, viz., the act to incorporate the E., L. & B. S. Co., approved January 29th, 1869; an amendatory act, approved February 3rd, 1871, and still another of March 27th, 1872, authorizing the Elizabethtown, Lexington and Big Sandy R R. Co. to bridge the Big Sandy river. Under these acts the line of the Elizabethtown, Lexington and Big Sandy R. R. was constructed from Lexington, Kentucky, to the pier on the west bank of the Big Sandy river, terminal facilities in the city of Louisville, Kentucky, being provided
50 by contract between the Elizabethtown, Lexington and Big Sandy Railroad Co., the Louisville and Nashville R. R. Co., and the Chesapeake and Ohio and Southwestern R. R. Co., dated December 28th, 1881. On November the 12th, 1879, an agreement was made between the Chesapeake and Ohio Railway Company and the Elizabethtown, Lexington and Big Sandy Railroad Company, the substance of which was that the Chesapeake and Ohio railway, whose line then terminated at Huntington, West Virginia, should extend its line some eight or nine miles from Huntington, in the State of West Virginia, to the western bank of the Big Sandy river, building a bridge across the Big Sandy river, and that the E., L. & B. S. R. R. Co., whose line then terminated at Mount Sterling, Kentucky, should build and complete its line from Mount Sterling to the Big Sandy river to a connection or point of junction with the Chesapeake and Ohio railway. It was also agreed that the E., L. & B. S. R. R. Co. should be allowed the free use of the eight miles of road, including the bridge, into the depot of the C. & O. railway, with terminal facilities at Huntington, for a term of five years from the date of the completion of the road between Huntington and the Big Sandy river. This road was completed early in 1882. The foregoing enactments, all duly authenticated and by consent returned with the deposition as part thereof, are hereto appended so far as is necessary to show their nature and the grant of power contained therein, marked "H. T. W. 1, 2, 3, 4, 5, 6."

H. T. W. No. 1.

An act to incorporate the Elizabethtown, Lexington and Big Sandy Railroad Company.

Whereunder forty-five gentlemen of different counties of the State of Kentucky, and two of the State of Mississippi are appointed
51 commissioners; under the direction of whom, or any three of whom subscriptions may be received to the capital stock of the Elizabethtown, Lexington and Big Sandy R. R. Co., which is

hereby incorporated, and they may cause books to be opened at such time and places as they may direct for the purpose of receiving subscriptions, etc.

SECTION 2. That the capital stock of the Elizabethtown, Lexington and Big Sandy R. R. Co. shall be five millions of dollars, in shares of one hundred dollars each, which may be subscribed by any individual, company or corporation, and as soon as two thousand shares of said stock shall be subscribed, the subscribers, their successors and assigns, shall be, and are hereby declared to be, incorporated into a company etc.

SECTION 3. Prescribes the mode in which subscriptions shall be paid.

SECTION 4. That at the expiration of the period for which the books are first opened, if two thousand shares of the capital stock shall have been subscribed, and if not, as soon thereafter as the same shall be subscribed, said commissioners or a majority of them living, shall call a meeting, at such time and place as a majority of those acting shall designate, giving at least ten days' notice of the time and place in one or more newspapers; and at such meeting said commissioners shall lay the subscription books before the subscribers then present, and thereupon said subscribers, or a majority of them present, shall have power to elect, out of their own number, by ballot, nine directors to manage the affairs of said company, and the nine directors, or a majority of them, shall have power to
52 elect a president of said company from among the directors, and to allow him such compensation for his services as they may think proper, and at such election, and on all other occasions, where a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share of stock owned by such voter; and any stockholder may, in writing, depute any other person to act as proxy for him, it or her; and said commissioners aforesaid, or any three of them, shall be judges of said first election.

SECTION 5. That to continue the succession of the president and directors of said company, nine directors shall be chosen annually on the first Saturday in June of each year etc.

SECTION 6. Provides that no general meeting of the stockholders shall be proceeded with, unless stockholders, having a majority of stock subscribed, attend in person, or by proxy.

SECTION 7. Provides for an annual report to be made by the president and directors.

SECTION 8. Provides for the oath of office by the president and directors to well and truly discharge the duties of their respective offices to the best of their skill and judgment.

SECTION 9. Provides for the reopening of the books if the stock remains unsubscribed.

SECTION 10. Provides that said president and directors, or a majority of them, may appoint all such officers agents or servants, as they may deem expedient and for the business of the company, and may remove the same at pleasure, or said board of directors,
53 may delegate to their president the power to appoint or re-

move any or all such employees subject to their approval at the first meeting thereafter.

SECTION 11. Contains authority to the president and directors to increase the capital stock of the company.

SECTION 12. That the president and directors of said company are hereby vested with all the powers and rights necessary to the construction of a railroad from Elizabethtown to a point on the Big Sandy at or within twenty miles of its mouth, along such route as may be selected by the president and directors, and that they may cause to be made contracts which shall be signed by the president, with any corporation, companies or individuals, for making said road, or any part of it; and that they may purchase or lease any road or roads, connecting with their said road, and that they, their agents, engineers, etc., or those with whom they may contract for surveying or making the same, or any part thereof, may enter upon, use and excavate any land etc.

SECTION 17. That this act shall take effect from and after its passage, the General Assembly reserving the right to alter, amend or repeal this act.

Approved January 29th, 1869.

H. T. W. No. 2.

An amendatory act which among other things provides and enacts:

SECTION 7. That the president and directors of said company may, with the assent of the holders of a majority in value of the stock of said company, purchase and hold any other railroad in this
54 or any other State, and may subscribe stock in, or aid in the building of any other road in or out of this State, whenever, in their judgment, it may be to the interest of the Elizabethtown, Lexington and Big Sandy railroad, they may sell the said Elizabethtown, Lexington and Big Sandy railroad or lease the same; and may build branches from said road and branches from said branches.

Approved February 16, 1870.

H. T. W. No. 3.

An act approving and legalizing the transfer of the rights, property, and franchises of the Lexington and Big Sandy R. R. Co., Western division, to the Elizabethtown, Lexington and Big Sandy Railroad Co. and authorizing the E., L. & B. S. R. Co., by branches or otherwise, to fix a western terminus to their road at Louisville.

That the said E., L. & B. S. R. R. be, and the same is hereby, divided into two sections—that part east of Lexington to be known as the Eastern division and that part west of Lexington to constitute and be known as the Western division.

Approved February 3rd, 1871.

H. T. W. No. 4.

SECTION 1. That the E., L. & B. S. Co., "a corporation legally incorporated and organized under the laws of this Commonwealth, and now existing therein; and the C. & O. Railway Company, a corporation legally incorporated and organized under the laws of Virginia and West Virginia and now existing therein, be,
55 and each of them hereby is, authorized as a part of its line of railroad, to build and work a railroad bridge across the Big Sandy river," etc.

Approved March 27th, 1872.

H. T. W. No. 5.

Written agreement made December 28th, 1881, between the Louisville and Nashville R. R. Co., the Chesapeake and Ohio and Southwestern Railway Company, and the Elizabethtown, Lexington and Big Sandy R. R. Co.

"Whereas the party of the first part owns, controls and operates the line of railroad from the city of Louisville to Elizabethtown in the State of Kentucky and also owns a line of railroad from *from* the said city of Louisville to Cecelian Junction etc. Whereas the E., L. & B. S. Co. owns, operates and controls the line of railroad from the eastern boundary of Kentucky, where it connects with the line of the C. & O. railway, to Lexington, where it intersects and connects with the lines of the said party of the first part, and with the Kentucky Central R. R.: Whereas the C. & O. & S. W. railway owns, controls and operates the lines of railroad from Elizabethtown to Paducah and thence, (with the exception of a short gap now in progress of completion) to Memphis in the State of Tennessee and with authority to extend its said line to the city of Louisville" and it is the desire of all the said parties to make such mutually advantageous arrangements as shall enable the parties of the second and third parts to do business into the city of Louisville and through the said city, terminal facilities are by said contract provided.

SECTION 1. The party of the first part shall lease and has leased the Cecilia branch to the Chesapeake, Ohio and Southwestern Railway Co.

56 SECTION 2. The party of the second part will construct a track or tracks from the said leased line in the city of Louisville to connect with the main line of the L. & N. R. R. Co. etc.

SECTION 3. The said party of the first part shall provide motive power, conductors and crews and shall transport for the parties of the second and third parts their trains, both freight and passenger between Lexington and the Louisville, Cincinnati and Lexington, or short-line depots in Louisville, etc.

The party of the first part shall open its line from Louisville to Cincinnati to the Chesapeake, Ohio & Southwestern Co. on the usual terms of business between connecting and friendly railroads, that is

to say, all through business, both freight and passenger shall be prorated between the parties thereto according to the distance traversed on the respective roads of each, but freight and passengers to or from local points on any road shall pay local to such roads.

SECTION 11. The parties of the second and third parts may maintain at their own expense, if they so elect, freight and ticket offices in the cities of Lexington and Louisville but all such tickets issued therefrom, or transportation over said road, shall have regular coupons attached for the transportation over the road of the party of the first part between Louisville and Lexington.

SECTION 17. This agreement shall bind the said several parties and their successors from the date hereof, and shall be put in practical operation as rapidly thereafter as circumstances may permit, and shall continue except as hereinbefore otherwise provided in full force for ninety-nine years.

57 EXHIBIT H. T. W. No. 6.

Agreement for Completion of E., L. & B. S. R. R. and Operation of Railroad between Big Sandy River and Huntington.

Agreement in writing and under seal made November 12th, 1879, between the C. & O. R. R. Co., a corporation existing under the laws of Virginia and West Virginia, and the E., L. & B. S. Co., a corporation existing under the laws of Kentucky.

Whereas, the party of the first part is the owner of and is operating a railroad from the James river in Virginia to the city of Huntington in West Virginia, and has the right to complete and operate its road from said city of Huntington to a connection with the railroad which the party of the second part proposes to build to the western bank of the Big Sandy river in the State of Kentucky. And whereas, it is greatly to the interest of the party of the first part that the railroad of the party of the second part should be completed and put in operation to afford the party of the first part a western outlet, now therefore this agreement, witnesseth: That for and in consideration of the premises and the sum of one dollar by each of the parties to the other in hand paid, etc. the party of the second part agrees that it will build and complete its railroad from Mount Sterling to the Big Sandy river in said State of Kentucky to a connection with the road of the party of the first part in such manner that the party of the first part may have a western outlet by rail within three years from January 1st, 1880. In consideration whereof, the party of the first part agrees to complete that part of its railroad from said city of Huntington to and across the Big Sandy river within one year from the 1st day of Jan-
58 uary 1880 and to allow the party of the second part the free and uninterrupted use of its railroad from the western bank of the Big Sandy river across said river and to the depot of the said party of the first part in said city of Huntington, and to the use of depot, offices and baggage-rooms, and other railroad, build-

ings, turn-tables, wood and water stations and other necessary terminal facilities in said city of Huntington for the term of five years from the date of the completion of the road between Huntington and the western bank of the Big Sandy river, etc. In testimony whereof said parties have caused these presents to be signed by their presidents and attested by their secretaries respectively and their respective corporate seals to be hereunto affixed on the day and year first above written, pursuant to the orders of their respective boards of directors, heretofore made.

In pursuance of the purpose for which the N. N. & M. V. Co. had been organized, as hereafter shown, the following leases, being H. T. W. 8 and H. T. W. 9, by consent returned with and made part of this deposition, were made and entered into:

59 H. T. W. No. 8.

This indenture, made and entered into this twenty-ninth day of January, 1886, by and between the Elizabethtown, Lexington & Big Sandy Railroad Company, a corporation existing under the laws of the State of Kentucky, party of the first part, and the Newport News and Mississippi Valley Company, a corporation existing under the laws of the State of Connecticut, party of the second part, witnesseth:

First. The party of the first part hereby leases to the party of the second part for the period of two hundred and fifty years from and including the first day of February next, the railroad of the party of the first part, extending from the city of Lexington, in the State of Kentucky, to a junction with the railroad of the Ashland Coal and Iron Company, near Denton, and from the point known as Ashland Coal and Iron Junction to the west side of the Big Sandy river, together with all the rights and privileges of the party of the first part under and in pursuance of the agreements between the said party of the first part and the Ashland Coal and Iron Company, in respect to the railroad of said last-mentioned company, between the junction near Denton above referred to and the point known as Ashland Coal and Iron Junction, and under and in pursuance of the agreements with the Chesapeake and Ohio Railway Company in respect to the railroad from the west bank of the Big Sandy river to Huntington, in the State of West Virginia, and also all depots and station-houses, equipments and appurtenances of every kind and nature whatsoever to the said railroads respectively belonging or appertaining.

60 Second. The party of the second part will pay to the party of the first part a fixed yearly rental for the premises so leased amounting to the sum of five thousand dollars per annum, which rental shall be paid in four equal installments of twelve hundred and fifty dollars each, on the first days of February, May, August, and November of each year during the pendency of this lease (excepting only the first day of February, 1886), it being understood and agreed that the amount of such rental, so far as requisite, shal

be appropriated and applied by the party of the first part to the expenses of maintaining and keeping up its corporate organization under the laws of the State of Kentucky.

Third. The party of the second part is to operate the said leased road, and also the lines of railroad covered by the agreements with the Ashland Coal and Iron Company and the Chesapeake and Ohio Railway Company hereinbefore mentioned. The said lessee shall, in the first place, out of the earnings and income derived therefrom, pay the cost of operating such railroads and the incidental expenses connected therewith including the sums payable under such agreements with the Ashland Coal and Iron Company and the Chesapeake and Ohio Railway Company, and the sums payable for installments of interest and principal from time to time maturing on the equipment bonds of said Chesapeake and Ohio Railway Company to the amount in the aggregate of $38,000, par value, heretofore assumed by said party of the first part, and likewise so pay the taxes and assessments on the said demised premises, the cost of insurance thereof, if and so far as effected, such amounts as
61 it may become necessary to pay for damages to persons or property incurred in the course of operating the said railroads and the expenses of repairing, maintaining, improving, adding to and keeping up the said railroads, with all their appurtenances, and of maintaining, providing and keeping up in suitable condition and repair rolling stock and equipment for carrying on as economically and profitably as may be the transportation business of said railroads, and after the payments and deductions aforesaid, the said lessee shall apply the residue of the amount of the net income and earnings of said railroads to such extent as shall be required for the purpose, to the payment of the current interest and sinking fund contributions from time to time becoming due and payable during the existence of this lease upon the now existing bonded indebtedness of the party of the first part, and such other bonded indebtedness of said party of the first part as may be created by said party of the first part with the assent of the party of the second part hereto; and if in any year the amount of surplus of net earnings and income, applicable by the lessee to the payment of current interest and sinking fund contributions as aforesaid shall not be sufficient for the payment of the whole of such interest and sinking fund contributions, preferences in the payment of such interest and sinking fund contributions shall be made by the lessee in the order and manner following, viz: in the first place, there shall be paid with *pro rata* equality, so far as the funds applicable thereto will suffice therefor, the interest upon the first-mortgage bonds of the party of the first part issued under and secured by its mortgage to Philo. C. Calhoun and William K. Kitchen, as trustees, bearing date the 1st day of March, 1872. In the second place, there shall be paid with *pro rata* equality, so far as the funds applicable
62 thereto will suffice therefor (unless otherwise agreed between the parties hereto), the interest upon any other bounded indebtedness of said party of the first part which may be hereafter created by said party of the first part with the assent of the party of

the second part hereto; provided, further, that if in any year there shall be a deficiency of funds to pay in full the interest upon any prior class of bonds above mentioned or referred to, it shall be entitled in succeeding years to be fully made up and provided for in preference to and priority over any payment in such succeeding year, of interest, either current or past, upon bonds of any subsequent class.

And it is further provided and agreed, by and between the parties hereto, that on the first day of March in each year during the continuance of this lease, the party of the second part shall pay to the party of the first part such balance, if any, of the net earnings or income received by the party of the second part from the raid railroads with the appurtenances for the year ending on the thirty-first day of December then next preceding, as shall remain in its hands after all the payments, expenses and deductions and all the payments for interest and sinking fund contributions hereinbefore provided for, or agreed, or directed to be made are paid. Provided, however, that if at the time, viz.—such first day of March, when such balance of such income or rental is provided to be paid to the party of the first part, there shall be any sum due or owing from the party of the first part to the party of the second part, for or in respect of advances or payments heretofore made by the party of the second part, to or for, or upon the request of the party of the first part for new additions or improvements to the said rail-
63 roads or any part thereof, or for expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for the transfer of its stock and bonds or for any expenses of its business or affairs other than such as fall within the expenses before provided to be paid by the lessee out of the earnings or income, or for or in respect of any other sums which may have been lawfully advanced or paid by the lessees to or for the party of the first part, the party of the second part shall be entitled to retain and pay to itself whatever may be owing to it from the party of the first part for or in respect of any of the causes or matters or considerations aforesaid, incoading any interest which may be due or owing from the party of the first part to the party of the second part thereon, and provided further, that if such balance of net earnings or income received by the party of the second part from the said leased premises with the appurtenances, for any year, and which, by the foregoing provisions hereof, would be and become payable by said party of the second part to said party of the first part, shall exceed the amount of six per cent. per annum upon the par value of the then existing capital stock of the party of the first part, after paying such amounts as the party of the first part may be required to pay in respect of its outstanding certificates of indebtedness, then and in that event the said party of the second part shall be entitled to and shall retain to itself for its own use, any and all excess of such balance of net earnings and income over and above the amount of six per cent. per annum upon the par value of the then existing capital stock of the party of the first part, and the

amounts which the party of the first part is required to pay in respect of such certificates of indebtedness.

64 Fourth. It is further understood and agreed between the parties hereto, that at the time when this lease shall go into operation the party of the second part shall receive and be entitled to use and apply in the operations of the said railroads all fuel, rails and materials and supplies which shall then be on hand belonging to the party of the first part; and likewise to collect and receive all sums which may be at that time due and owing to the party of the first part for freights and passage money including all sums in the hands of agents and employees or due from connecting roads, and likewise that the sums that may at such time be due or owing by the party of the first part for back wages of employees and for fuel, rails and other materials and supplies for the business of said railroads, or to connecting roads, or damages to persons or property in the operation of the roads or for other incidental expenses of the party of the first part, shall be paid by the party of the second part, and all the receipts and payments for and on account of such back freights and passage money, and moneys in the hands of agents, employees or connecting roads, and for such back wages and debts for fuel, rails and other materials and supplies and to connecting roads, and for damages to persons and property and incidental expenses as aforesaid, shall be brought into and form part of the accounts of the party of the first part with the party of the second part hereunder, for the year ending December 31st, 1886, in like manner and with like effect in all respects as if the same had accrued during that year.

65 Fifth. In case the amount of net earnings or income of the said railroads applicable under the preceding provisions hereof to the payment of the current interest upon the bonded indebtedness of the party of the first part, shall be insufficient in any year to pay in full such current interest for the year, it shall be optional with the party of the second part, whether or not to advance or pay for account of the party of the first part the amount of such deficiency, and if the party of the second part shall advance or pay for account of the party of the first part such deficiency or any part thereof, it shall be entitled to interest at the rate of six per cent per annum upon such advances or payments until reimbursed therefor, and shall be entitled to repay itself for such advances or payments and interest at any time, or from time to time, out of any subsequent earnings or income of said railroads in the manner provided by the third article hereof in that behalf, and shall have a lien therefor upon the demised premises and the income thereof until such advances or payments with interest thereon shall be reimbursed; and in case the party of the second part shall at any time, or from time to time, make any advances to or for the party of the first part, at its request, for new additions or improvements of the said railroads, or any part thereof, or for the necessary expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for transfer of its stock and bonds or for other incidental expenses not paid by the party of the second

part under the lease, or for any other object or purpose, the party of the second part shall be entitled to receive interest upon all such advances at the rate of six per cent. per annum from the making until, the reimbursement thereof, and the party of the second
66 part shall have a lien for such advances and the interest thereon upon the said demised premises and the income thereof until such advances are reimbursed, with interest, and the party of the second part shall be entitled at any time, and from time to time, to refund to itself such advances and interest out of any earnings or income of the said railroads which may be in its hands, unless it shall have been expressly agreed between the parties hereto to the contrary in writing, at or before the making of such advances.

Sixth. This indenture may be at any time modified in any of its terms or provisions or cancelled by agreement of the parties thereto.

In witness whereof, the parties hereto have hereunto respectively affixed their corporate seals, and caused these presents to be signed by their respective presidents and attested by their respective secretaries the day and year first above written.

ELIZABETHTOWN, LEXINGTON AND BIG SANDY RAILROAD CO.,

[SEAL.] By A. L. REID, *President.*

Attest: W. C. EMERY, *Secretary.*

NEWPORT NEWS AND MISSISSIPPI VALLEY CO.,

[SEAL.] By C. P. HUNTINGTON, *President.*

Attest: I. E. GATES, *Secretary.*

67 H. T. W. No. 9.

This indenture, made and entered into this 15th day of June, 1886, by and between the Chesapeake and Ohio Railway Company, a corporation existing under the laws of the States of Virginia and West Virginia, party of the first part, and the Newport News and Mississippi Valley Company, a corporation existing under the laws of the State of Connecticut, party of the second part, witnesseth:

First. The party of the first part hereby leases to the party of the second part for the period of two hundred and fifty years from and including the 1st day of July next the railroad of the party of the first part extending from Phœbus, in the State of Virginia, to Huntington, in the State of West Virginia, with the branc-es and sidings, now owned and operated by the party of the first part, together with all the rights and privileges of the party of the first part, under and in pursuance of the agreements between said party of the first part and the Elizabethtown, Lexington and Big Sandy Railroad Company in respect to the railroad between Huntington and the west side of the Big Sandy river and also all depots and station-houses equipments and appurtenances of every kind and

nature whatsoever to the said railroad respectively belonging or appertaining.

Second. The party of the second part will pay to the party of the first part a fixed yearly rental for the premises so leased amounting to the sum of five thousand dollars per annum which rental shall be paid in four equal quarterly installments of twelve hundred and fifty dollars each on each first day of January, April, July and October, during the pendency of this lease, excepting only the
68 first day of July, 1886 it being understood and agreed that the amount of such rental, so far as requisit- shall be appropriated and applied by the party of the first part to the expenses and maintaining and keeping up its corporate organization under the laws of the States of Virginia and West Virginia.

Third. The party of the second part is to operate the said leased road, including such branches and sidings. The said lessee shall, in the first place, out of the earnings and income derived therefrom pay the costs of operating the same and incidental expenses connected therewith, and the sums payable for instalments of interest and principal from time to time maturing on the equipment bonds of said party of the first part and likewise pay the taxes and assessments on the said demised premises, the costs of insurance thereof, if and so far as effected, such amounts as it may become necessary to pay for damages to persons, or property incurred in the course of operating the said railroads and for repairing, maintaining, improving, adding to and keeping up the said railroads with all their appert-ances and maintaining, providing and keeping up in suitable condition and repair rolling stock and *a*equipment for carrying on as *a*conomically and as profitably as may be the transportation business of said railroads; and after the payments and deductions aforesaid the said lessee shall apply the residue of the amount of the net income and earnings of said railroad, to such extend as shall be required for the purpose to the payment to the current interest from time to time becoming due and payable, during the existence of this lease upon the now existing bonded indebtedness of the party of the first part, and such other bonded indebtedness of said party of the first part as may be created by said party of the first
69 part with the assent of the party of the second part thereto; and if in any year the amount of surplus, net earnings and income applicable by the lessee to the payment of current interest as aforesaid shall not be sufficient for the payment of the whole of such interest, preferances in the payment of such interest shall be made by the lessee in the order and manner following viz:

In the first place, there shall be paid with *pro rata* equality, so far as the funds applicable thereto will suffice therefor, the interest upon the purchase-money, funding bonds of the party of the first part, issued under and secured by its mortgage to Joseph Bryan and Henry T. Wickham, trustees dated July the 1st, 1878.

In the second place there shall be paid *pro rata* equality, so far as the funds thereto will suffice therefor, the interest upon the two million dollars par value of the gold bonds of 1908 known as the "series A" bonds, issued under and secured by its mortgage to the

Central Trust Company of New York, dated July 1st, 1878, and its mortgage to John Hillhouse and Edward St. John dated January 1st, 1881, and upon the further two million dollars par value of its bonds of 1911, issued under and secured by its said mortgage to John Hillhouse and Edward St. John, as trustees, bearing date January 1st, 1881, such payments to be made with *pro rata* equality upon the two million dollars par value of such "series A" bonds and the two million dollars par value of such bonds of 1911 secured by the said mortgage to said John Hillhouse and Edward St. John, dated January 1st, 1881.

In the third place, there shall be paid, with *pro rata* equal-
70 ity, so far as the funds applicable thereto will suffice therefor, the interest upon the fifteen million dollars par value of its gold bonds of 1908, known as the "series B" bonds, issued and secured by its said mortgage to the Central Trust Company of New York, bearing date July 1st, 1878.

In the fourth place, there shall be paid, with *pro rata* equality, so far as the funds applicable thereto will suffice therefor, the deferred interest script, class A, issued for one-half part of the coupons due May the 1st, 1885 on "series B" bonds of the party of the first part.

In the fifth place, there shall be paid, with *pro rata* equality, so far as the funds applicable thereto will suffice therefor, the deferred interest script, class B, issued for one-half part of the coupons due November the 1st, 1885, on "series B" bonds of said company.

In the sixth place there shall be paid, with *pro rata* equality, so far as the funds applicable thereto, will suffice therefor the deferred interest script, class C, issued for two-thirds part of the coupons due May the 1st, 1886, on "series B" bonds of said company.

In the seventh place there shall be paid, with *pro rata* equality, so far as the funds applicable thereto will suffice therefor interest upon its bonds of 1918 issued under and secured by its mortgage to Alexander B. Green and Issac E. Gates, dated July 1st, 1878.

In the eighth place, there shall be paid, with *pro rata* equality, so far as the funds applicable thereto will suffice therefor, the interest upon its gold bonds of 1922 issued under and secured by its mortgage to Joseph B. Lloyd and Frank H. Davis, dated June 1st, 1882, Provided, however, that all the net earnings and income derived from the property described in and mortgaged by
71 the last-mentioned mortgage shall so far as requisite for the purpose, be in the first instance, applied, with *pro rata* equality, to the payment of interest upon the said bonds of 1922 secured thereby.

In the ninth place, there shall be paid, with *pro rata*, equality, so far as the funds applicable thereto will suffice therefor (unless otherwise agreed between the parties hereto), the interest upon any other bonded indebtedness of said party of the first part, which may be hereafter created by said party of the first part with the assent of the party of the second part.

Provided further, that if in any year there shall be a deficiency of funds to pay in full the interest upon prior class of bonds above

mentioned or referred to, it shall be entitled, in succeeding years to be fully made up and provided for in preference to and priority over any payment in such succeeding years, of interest either current or past, upon bonds of any subsequent class.

And it is further provided and agreed by and between the parties hereto, that on the first day of April, in each year, during the continuance of this lease the party of the second part shall pay to the party of the first part, such balance, if any, of the net earnings or income received by the party of the second part from the said railroad, with the appurtenances, for the year ending on the 31st day December then next preceeding as shall remain in its hands after all the payments, expenses and deductions, and all the payments for interest, hereinbefore provided for, or agreed or directed to be made, are paid.

72 Provided however, that if at the time, viz: such first day of April, when such balance of such income or rental is provided to be paid to the party of the first part, there shall be any sum due or owing from the party of the first part to the party of the second part for or in respect of advances or payments heretofore made by the party of the second part for new additions or improvements to the said railroads, or any part thereof or for expenses of keeping up the corporate organization of the party of the first part or maintaining agencies for the transfer of its stock and bonds or for any expenses of its business or affairs other than such as fall within the expenses before provided to be paid by the lessee out of the earnings of the income or for or in respect of any other sums which may have been lawfully advanced or paid by the lessee to *to* for the party of the first part, the party of the second part shall be entitled to retain and pay to itself whatever may be owing to it from the party of the first part for or in respect of any of the causes or matters of consideration aforesaid, including any interest which may be due or owing from the party of the first part to the party of the second part thereon. And provided further, that if such balance of net earnings or income received by the party of the second part from the said leased premises with appurtenances, for any year, which by the foregoing provisions hereof, would be and become payable, by said party of the second part to said party of the first part shall exceed the amount of 6% per annum upon the par value of the then existing capital stock of the party of the first part, then and in that event the said party of the second part shall be entitled to and shall retain to itself for its own use, any and all excess of such balance of net earnings and income over and

73 above the amount of 6% per annum upon the par value of the then existing capital stock of the party of the first part.

Fourth. It is further understood and agreed between the parties hereto that at the time when this lease shall go into operation the party of the second part shall receive and be entitled to use and apply, in the operation of said railroads, all fuel, rails and materials and supplies which shall then be on hand belonging to the party of the first part and likewise to collect and receive all sums which may be at that time due and owing to the party of the first part for

freights and passage money, including all sums in the hands of agents or employees or due from connecting roads and likewise that the sums that may at such time be due or owing by the party of the first part for back wages of employees and for fuel, rails and other materials and supplies for the business of said railroads, or to connecting roads, or damages to persons or property in the operation of the roads, or for other incidental expenses, of the party of the first part, shall be paid by the party of the second part and all the receipts and payments for and on account of such back freights and passage money and moneys in the hands of agents employees or connecting roads, and for such back wages and debts for fuel, rails and other materials and supplies and to connecting roads, and for damage to persons and property and incidental expenses as aforesaid, shall be brought into and form part of the accounts of the party of the first part with the party of the second part hereunder for the year ending December 31, 1886, in like manner and with like effect, in all respects as if the same had accrued during that year.

Fifth. In case the amount of net earnings or income of the
74 said railroads applicable under the preceding provisions hereof to the payment of the current interest upon the bonded indebtedness of the party of the first part shall be insufficient in any year to pay in full such current interest for the year it shall be optional with the party of the second party whether or not to advance or pay for account of the party of the first part the amount of such deficiency and if the party of the second part shall advance or pay for account of the party of the first part such deficiency or any part thereof it shall be entitled to interest, at the rate of 6 % per annum, upon such advances or payments until reimbursed therefor, and shall be entitled to repay itself for such advances or payments, and interest at any time or from time to time, out of any subsequent earnings or income of said railroads, in the manner provided by the third article hereof in that behalf, and shall have a lien therefor upon the demised premises and the income thereof until such advances or payments with interest thereon shall be reimbursed; and in case the party of the second part shall at any time or from time to time, make any advance to or for the party of the first part for new additions or improvements of the said railroads or any part thereof, or for the necessary expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for transfer of its stock and bonds, or for other incidental expenses not paid by the party of the second part under the lease, or for any other object or purpose the party of the second part shall be entitled to receive interest upon all such advances, at the rate of 6 % per annum from the making until the reimbursement thereof and the party of the second part shall have a lien for such advances and the interest thereon upon the said demised
75 premises and the income thereof until such advances are reimbursed with interest; and the party of the second part shall be entitled at any time, and from time to time, to refund to itself such advances and interest out of any earnings or income of

the said railroads which may be in its hands, unless it shall have been expressly agreed between the parties hereto to the contrary, in writing, at or before the making of such advances.

Sixth. This indenture may be at any time modified in any of its terms or provisions, or cancelled by agreement by the parties thereto.

In witness whereof, the parties hereto have hereunto respectively affixed their corporate seals, and cause these presents to be signed by their respective presidents and attested by their respective secretaries the day and year first above written.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
By C. P. HUNTINGTON, *President.*

Attest:
[SEAL.] EDW'D T. TOURNIER, *Secretary.*

NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,
By C. P. HUNTINGTON, *President.*

Attest:
[SEAL.] I. E. GATES, *Secretary.*

76 Q. After these leases were made were these roads operated by the N. N. & M. V. Co.? A. Yes, sir; the Chesapeake and Ohio railway got into financial difficulties and was put in the hands of a receiver by the decrees of the circuit courts of Henrico county, Virginia, and Kanawha county, West Virginia, entered, respectively, on the 27th and 28th days of October, 1887. From the date of the lease until the property of the C. & O. Company was placed in the hands of the receiver the N. N. & M. V. Co. operated the C. & O. Railway Company. After the appointment of a receiver by the court the N. N. & M. V. Co. had nothing whatever to do with the C. & O. Railway Company, but continued to operate the E., L. & B. S., under the lease from that road, "until some time in 1892, I think." "My connection with the Newport News and Mississippi Valley Company terminated with the appointment of a receiver. I then became general solicitor for the receiver. Prior to the appointment of the receiver I have been general solicitor of the Newport News and Mississippi Valley Company."

Collis P. Huntington, a native of Connecticut, for many years a resident of California, and for twenty years past a resident of New York, was very largely interested in and was the controlling spirit in a number of railroads situated both west and east of the Mississippi. He built many new lines and extended many old ones. I have been in constant communication with Mr. Huntington for nearly twenty years past. He had a plan for bringing into practically one management a line of road extending from the Atlantic to the Pacific. His lines west of the Mississippi he consolidated under the name of the Southern Pacific Railway Company.

77 He obtained a charter under the same name from the State of Connecticut, but subsequently determined to organize his properties west of the Mississippi under a Kentucky charter to the

Southern Pacific Company, and he got from the legislature of the State of Connecticut an act changing the name of the Connecticut organization of the Southern Pacific Company to the Newport News and Mississippi Valley Company. Under this charter he organized his lines east of the Mississippi river, consisting of the C. & O. Railway Company, the E., L. & B. S. Company, and the Chesapeake and Ohio and Southwestern Company. The act of the Connecticut legislature incorporating the Southern Pacific Company was approved March 27th, 1884, being H. T. W. No. 7, an act creating Henry Sanford, A. N. Hawley, and others a body politic and corporate under the name of the Southern Pacific Railroad Company, "authorized and empowered to contract for and acquire, by purchase or otherwise, and buy, hold, own, lease, etc., railroads, railroad bridges, engines, cars, rolling stock, and other railway equipment, stores, and warehouses, etc., and enter into any contracts with any corporation, company, association, etc., in respect to their bonds, stocks, obligations, or securities and in respect to the construction, establishment, acquisition, holding, equipping, leasing, maintaining, or operating any railroads, etc., in any State or States, Territory of the United States, or in any foreign country," etc., "Provided, however, that said corporation shall not have power to make joint stock with, lease, hold, own, or operate any railroad within the State of Connecticut."

The act changing the name to the Newport News and Mississippi Valley Company, with all the powers and privileges and sub-
78 ject to all the liabilities existing under the former name, was approved March 10th, 1885. The Newport News and Miss. Valley Co. had organized and taken a number of leases from the foregoing companies, when a question arose as to the provisions of the original act, approved March 27th, 1884, which provided that the company should not have the power to make joint stock with, own, hold, or operate any railroad in the State of Connecticut; it was resolved by the assembly that the said act be amended by adding to the second section thereof the following: "Unless such railroad shall be held, owned, or operated within said State in conformity with the provisions of the general law of the State," Approved April 27th, 1887. Said three acts of the Connecticut legislature were duly authenticated according to law and by consent returned with the deposition.

The C. & O. Railway Company was so named for the first time in the deed executed July 1st, 1873, to the purchasers at the sale for the foreclosure of the mortgages of the old C. & O. Railroad Company. The completion of a line from the Chesapeake to the Ohio was an object very much desired by the people of Virginia and West Virginia. Their financial condition, however, and their constitutions prevented further appropriations. Finally an act was passed by the legislature of the State of West Virginia on February 26, 1867, and by the legislature of Virginia on March 1st, 1867, entitled An act to provide for the completion of a line or lines of railroads from the waters of the Chesapeake to the Ohio river," substantially duplicates of each other. "It shall be the duty of

said company within six years after its organization to complete the railroad from Covington to the Ohio river; they may
79 select a mouth of the Big Sandy river or the mouth of the Great Kanawha river as the Ohio terminus of their road, or they may construct a branch of their roads to both points." Extract from Virginia act of March 1, 1867. H. T. W. 15.

The C. & O. R. R. was completed to Huntington, but this was not satisfactory to the people of West Virginia, and on February 20th, 1877, and act was passed providing for a terminus on the Big Sandy river (H. T. W. No. 18). This extension from Huntington to the Big Sandy river, a distance of about eight miles, was not completed until several years later, when the Elizabethtown, Lexington and Big Sandy R. R. Co. made the contract with the C. & O. R. R. Co. above referred to. It was built the early part of 1882.

Q. While the N. N. & M. V. Company was operating the E., L. & B. S. Co. what relations had the C. & O. Railway Company with that company and the N. N. & M. V. Co.? What relations existed between the companies? A. None whatever except as set out in the lease of January 15, 1886.

Q. What, if anything, did the C. & O. Railway Company have to do with the operation of the E., L. & B. S. R. R. at that time? A. Nothing whatever.

Cross-examination:

Mr. Huntington controlled a number of disconnected roads both east and west of the Mississippi, which he desired to extend, complete, and bring under one management, that of himself.
80 He was president of the N. N. & M. V. Company, and also of the Southern Pacific Company. He organized the lines west of the Mississippi river under the charter of the Southern Pacific Company; those east of the Mississippi he organized under the charter of the Newport News and Mississippi Valley Company. The roads which composed the system organized under the last-mentioned charter were the C. & O. railway, extending from Phœbus, a station about a mile east of Fortress Monroe, to the west bank of the Big Sandy river; the E. L. & B. S. R. R., which extended from the west bank of the Big Sandy river to the city of Lexington, Kentucky, with a running arrangement over the Louisville and Nashville railroad (under the contract heretofore referred to) into the city of Louisville, and the C. & O. Southwestern, which at the time of the leases extended from the city of Louisville to the city of Memphis, Tennessee. Mr. Huntington was in the act of bringing the Louisville, New Orleans and Texas Pacific Railway Company, which extended from Memphis to New Orleans, into the system, when financial troubles came and the plan was abandoned.

Q. As a matter of fact his plan was consummated and carried into effect east of the Mississippi with the C. & O. Railway Company and the E. L. & B. S. R. R. Co.? A. So far as these roads were concerned, the leases were duly made and his plan perfected so far.

Q. Mr. Huntington, at the date of the leases, controlled both of these roads, did he not? A. At the date of the leases Mr. Hunting-

ton was the president of the C. & O. R. R. Co. and was also the president of the N. N. & M. V. Co. He was not president of the E. L. & B. S. R. R. Co.; Mr. Reid was president of that com-
81 pany, but Mr. Huntington controlled both of these roads, in that he owned a very large portion of the stock and controlled most of that he did not own.

Q. So that practically it was all under his control? A. In one sense, yes, but not in the sense of their being identical or the same legal entities.

Q. Mr. Huntington's purpose was to have a continuous line of road from the eastern start of the road to Louisville, was it not? A. It was exactly as set out in the leases, and the contractual relations between the E. L. & B. S. R. R. Co. and the L. N. R. R. Co. forming through-rail connection from Louisville to Phœbus.

Q. That was the purpose—to have one rail line of road from Louisville to Phœbus, under one management and control? A. As stated; yes.

Q. What was that system called at that time? A. The N. N. & M. V. system; sometimes known as the C. & O. route.

Q. From Phœbus to Louisville was it not generally known to the public as the C. & O. railroad? A. I think not, sir. The advertisements in every paper along the line were in the name of the N. N. & M. V. Co.; the tickets were issued in that name. All business that I recall was conducted in the name of the N. N. & M. V. Co. I speak from recollection simply; I do not know this.

Q. Will you please look at the map I now hand you and ask you what it is? A. It is a time-table entitled: "C. & O., Newport News and Mississippi valley;" also entitled: "C. & O. route," purport-
82 ing to be in effect November 21st, 1886, giving connections and time of trains running between Washington and Louisville and other points. It was given to the public by the authority of H. W. Fuller, who was the general passenger agent of the Newport News and Mississippi Valley Company, approved by John Muir, who was the general traffic manager of the Newport News and Mississippi Valley Company, and approved by W. C. Wickham, who was the second vice-president of the Newport News and Mississippi Valley Company. Witness presumes it is substantially what was in effect before November 21st, 1886. I presume the one in effect Nov. 16 was substantially similar, the changes being possibly in times of trains, connections, etc.

(Hereunto attached is the map.)

83 Q. Well, now, this publication advertises on the back that this route is the C. & O. route, does it not? A. Yes, sir.

Q. And that it runs solid trains from one terminus to another? A. I think so.

Q. It shows the road that under this lease was run by the Newport News and Mississippi Valley Company, does it not? A. I think so.

Q. Why did that company give that publication to the world after

he making of that lease as the "C. & O. system"? A. It is not the C. & O. system.

Q. Well, the C. & O. route? A. The trade-mark, as it were, of the system was the C. & O. route. It was a well-known line, and was being advertised and pressed for all it was worth. The line to the seaboard lay principally over the property of the C. & O. Railway Company, and I presume the trade-mark or name was taken from that fact. One of the principal points in advertising was the picturesque C. & O. scenery, which, I presume, gave it the name of the C. & O. route.

Q. Prior to this lease, were any through trains run upon this route? A. Yes, sir.

Q. Under what arrangement; was it a continuous system? A. Practically; yes, sir. After the contract of November 12th, 1879, between the Chesapeake and Ohio Railway Company and the Elizabethtown, Lexington and Big Sandy Railroad Company, the former built the 8 miles of road, including the bridge across the Big Sandy
84 river, from Huntington to the west bank of the Big Sandy river, the latter completing its line to a junction or point of connection at the west bank of the Big Sandy, as I have said before, in the early part of 1882. The properties were then operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington, I have always understood, who was president of the Chesapeake and Ohio Company and controlled a majority of the stock of the Elizabethtown, Lexington and Big Sandy Railroad Company. Under the arrangement the officers of the Chesapeake and Ohio Company operated and maintained a line of railroad for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company from the west bank of the Big Sandy river to Lexington, and included in that also the 8 miles of track between the west bank of the Big Sandy river and Huntington. They operated it, as I have said, for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company, keeping an account on the books of the Chesapeake and Ohio Railroad Company of all receipts of every character between Huntington and Lexington, including also the Louisville connection, and charged to the Elizabethtown, Lexington and Big Sandy Railway Company all disbursements in that part of the line. The arrangement continued in effect until the organization of the Newport News and Mississippi Valley Company, when its operating officers, who were General Wickham and Mr. Fuller, operated the properties under the leases. The duration of this contract was five years from the date of the completion of the road, which was in the early part of 1882, which would have made the duration until 1887. The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose, by force of the arrangement then made. It
85 was terminated in the same manner it was made, by direction of Mr. Huntington. Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases he directed the operation of the line to be

had in accordance with these leases. Mr. Huntington undoubtedly controlled the whole enterprise, in that he held a controlling interest in each company. He was president of the Chesapeake and Ohio Railroad Company, the president of the Newport News and Mississippi Valley Company, and Mr. Reid, who was president of the Elizabethtown, Lexington and Big Sandy Company, acted always in Mr. Huntington's interest. The leases were prepared under the direction of Mr. Huntington and expressed, as far as they went, his desires toward the completion of the plan he entertained. This accident happened, I believe, on November 16th or morning of November 17th, 1886. When the leases went into effect it might be possible that there was on hand an old stock of Chesapeake and Ohio tickets, but my impression is that this issue of tickets must have been exhausted by the time of the accident and had been substituted by Newport News and Mississippi Valley Company tickets. At the time of the accident tickets were issued in the name of the Newport News and Mississippi Valley Company, as far as I know. Prior to the organization of the Newport News and Mississippi Valley Company the tickets were issued in the name of the Chesapeake and Ohio route, I think; am not sure whether they specified Chesapeake and Ohio Railway Company or the Chesapeake and Ohio route. The line was operated as I have said.

86 Q. Was it not known to the public everywhere as the C. & O. route, or the C. & O. road? A. It was known as the C. & O. route, so far as I know.

Q. It was known to the public as the C. & O. road, was it not, all the way through? A. Well, there is very little difference between route and road; route means road, I suppose.

Q. If any of the tickets had been outstanding at the time of this new arrangement, in which Mr. Huntington was the inspiring spirit, who had control of all these roads, would it be possible that a ticket that was left outstanding would not have entitled a passenger who purchased it to a passage over the road on that ticket? A. I do not know about that. I am inclined to think that the N. N. & M. V. Co. would undoubtedly have had the right to refuse to honor such a ticket.

Q. Suppose, as a matter of fact, that company did honor such a ticket and take it up, then what? A. Then I should say that the possessor of the ticket got ahead of the N. N. & M. V. Co. by that much, unless an agent of the N. N. & M. V. Co. had sold it.

Q. What company would be responsible, the C. & O.? A. I should think not, sir.

Q. Would the N. N. & M. V. Co. have been responsible? A. If the passenger was rightfully on the train, undoubtedly the N. N. & M. V. Company would have been liable for a breach of its duty as a common carrier, if any accident had happened by the negligence of the company.

Q. Suppose the plaintiff purchased this ticket and held it; got on this train on the 16th of November, 1886, for passage to Washington, and the ticket was taken up and recognized by the conductor,

and on the road she sustained an accident by the negligence
87 of the company who was carrying her, whoever it was, would she not have been entitled as against the C. & O.? A. Possibly, if she had been injured east of Huntington or east of the west bank of the Big Sandy river, upon the line of the C. & O., that company might have been liable as the owner of the road-bed, but beyond that point, where the line of the C. & O. did not extend, I do not think she would have any right against the C. & O. Railway Company. Her redress would have been against the E. L. & B. S. Co., possibly as the owner of the road-bed, or against the N. N. & M. V. Company for its breach of contractual relation or duty as common carrier. This would depend upon the leases.

Q. Was this case of Mrs. Howard's ever referred to you? A. I was the general solicitor of the N. N. & M. V. Co. at that time. I believe that it was.

Q. Who was Charles Tweed? A. Mr. Tweed was at that time the general counsel of the Newport News and Mississippi Valley Company; his office was in the Mills building, in New York, and he was also Mr. Huntington's lawyer.

Q. Was he the general counsel of the C. & O. Railway Co. at that time as well? A. I think not, sir.

Witness is shown the following letter:

Chesapeake and Ohio Railway Company, Mills building, seventh floor, room 1. Chas. H. Tweed, counsel.

NEW YORK, *March 7th*, 1887.

W. L. Armstrong, 71 Broadway.

DEAR SIR: Referring to your letter of the 25th ult. to Mr.
88 Huntington in regard to claim of Mrs. L. P. Howard, which you inform me has been placed in the hands of Mr. J. H. Judge, I should be very much obliged if you would ask Mr. Judge if he would have any objection to Dr. Meredith Clymer visiting Mrs. Howard, and if he has no objection thereto whether he will send me such a note as will secure Dr. Clymer an opportunity of seeing her.

Yours very truly,
(Signed) CHAS. H. TWEED.

WITNESS: I recognize this as the signature of Mr. Tweed, and the handwriting as that of his clerk.

Q. It was written from the office of the C. & O. Railway Company, was it not? A. Written with the caption that it shows. The letter was evidently a response to Mr. Armstrong's letter to Mr. Huntington, asking him to make some allowance, I presume, to Mrs. Howard, and I suppose Mr. Huntington sent it to Mr. Tweed to know how severely she was hurt, and Mr. Tweed wanted to have Dr. Clymer give his opinion.

Q. Is there not apparently a recognition of liability on the part of the C. & O. Railway Co.? A. I should say not, sir. The mere fact that it is headed "C. & O. Railway Company" I should not con-

sider an admission, in view of what I know to be the legal relations between the companies, as I have heretofore stated.

Q. Do you know that the C. & O. Railway Company, by the authority of Mr. Huntington, made any offer of compromise to Mrs. Howard by way of settlement of this matter? A. I think
89 not. I remember very distinctly that as general solicitor of the N. N. & M. V. Co. I directed the chief surgeon of that company, Dr. Brock, to see her in Washington. He did see her and paid her $200 as a settlement of her claim, which I vouched.

Q. After these leases had been made, did I understand you to say that a question was raised as to their validity? A. I do not remember just how it came up, but my impression is that it was deemed best to have the amendatory act to the charter of the Newport News and Mississippi Valley Company. My opinion was that the Newport News and Mississippi Valley Company had the right to take the lease from the Elizabethtown, Lexington and Big Sandy Railway Company under its charter, which will speak for itself, and the Elizabethtown, Lexington and Big Sandy Railway Company had the right under the Kentucky act of February 16th, 1870, section 7. I have no doubt about that.

Q. I understood you to testify in chief that a question was raised as to the validity of these leases? A. I do not think a question was raised as to the validity of the leases. The question raised was that as to the propriety of the charter of the Newport News and Mississippi Valley Company. The original act of March 17th, 1884, provided that the corporation then known as the Southern Pacific Company should not have power to make joint stock with, hold, operate or own any railroad within the State of Connecticut, but it gave it full power to lease any railroad outside of that State. No question was ever made as to the validity of the lease itself.

"My construction of the law as to the rights and liabilities of lessor and lessee companies is that where the lessor company has charter right to lease the road, and the lessee company has
90 charter right to take, the law and the sovereign has agreed to the transfer of the liability of the common carrier from the lesser company to the lessee company, that thereafter the relation between the two companies is only that prescribed by the terms of the written instrument itself."

And next, to maintain the issues on their part joined, the plaintiffs, by their counsel, read in evidence the deposition of Dr. MEREDITH CLYMER, as follows: Witness — a physician of New York city, and in the course of his practice made an examination of Mrs. Howard, the female plaintiff in this case. He did so at the instance of Henry Hill Anderson, of the firm of Howland and Anderson.

Q. In whose behalf did you make the examination? A. Chesapeake and Ohio Railroad Company; at least so understood by me.

Q. From whom? A. From Mr. Anderson, and, I think, also from Mr. Charles H. Tweed.

Q. When did you make the examination? A. On the 10th day of March, 1887.

Q. To whom did you render your report of the examination? A. To Henry H. Anderson.

Q. To whom did you render your bill for your services? A. C. & O. Railroad Company.

Q. And by whom were you paid for your services? A. C. & O. R. R. Co.; bill rendered April 18th, 1887, to May 19th, 1887, taken from my books.

Cross-examination:

Witness never has been the regular surgeon of any corporation; never had any connection with any corporation as railroad
91 surgeon; first knew Mr. Anderson as president of University Club, and received a request from him to make this examination; made two examinations—first, March 10th, the second May 13th, 1887. Witness was only concerned with the medical aspects of the case; identified two papers as being the two reports made by him, each containing his signature thereto, and being wholly in his handwriting.

Objection was made and sustained to reading the contents of these reports other than the following extract from the beginning of the first:

"56 W. 38TH ST., NEW YORK, *March* 11, 1887.

To Henry H. Anderson, Esq., counsellor-at-law, 35 Wall St., New York.

SIR: In compliance with your request, I visited and examined, on Thursday afternoon, March 10th current, Mrs. Laura P. Howard, of Washington, D. C., at No. 216 W. 46th street, New York, for the purpose of ascertaining her present physical condition and from what injury or injuries she is now suffering, or has at any time since November 17th, 1886, been suffering, as the alleged result of an accident to a train of the Chesapeake and Ohio railway at the above date, she claiming to have been a passenger at that time on the said train."

Witness had not seen Mrs. Howard since the second examination until some three or four months ago, when she called "to know the name of the lawyer who had sent me to make the examination," and I told her that he was dead—Henry Hill Anderson—but that
92 his firm was in existence, Howland and Anderson, and that he had a son in the firm, and also his former partner, Judge Howland, and if she wanted any information she could get it there. I asked her no questions about her condition, except she said she was still under Dr. Chrystie's care. I told her I had forgotten all about it, and if she wanted to know anything about the lawyer or who was the lawyer, that he was dead, and that his partner who was with him at the time and his son were still there.

Have known Dr. Chrystie for twenty-eight years. He stands very high in the profession as a specialist in orthop*ar*dic surgery; none better, I should think.

Here the plaintiff- rested; and therepon the defendant, by its counsel, moved the court to direct a verdict for the defendant on the ground that the evidence offered by the plaintiffs did not show liability on the part of the defendant for the injury complained of; but the court overruled this motion; to which ruling of the court the defendant then and there duly excepted, and the trial justice entered said exception upon his minutes.

Thereupon counsel for the defendant, to prove the issues on its part joined, called Dr. C. W. P. BROCK, who testified as follows: "Am a practicing physician of Richmond, Virginia; not on the train on which the accident occurred, but saw the plaintiff shortly after the injury." He took charge of the injured and brought them east. He asked Mrs. Howard several times if she would like to have her injuries examined, but she declined for some time. Finally she said she would like to have them examined. He made the examination, and the only evidence of injury which she showed at that time was a bruise on the buttock. He parted with her at
93 Clifton Forge, when she took the sleeper for Washington.

Some days afterwards Mr. Wickham, the general solicitor of the road, asked him to come to Washington and see Mrs. Howard and try to settle with her, inasmuch as he knew her, having met her on the road. In accordance with this request he came to Washington and saw Mrs. Howard at her home or boarding-house, and told her that he had been sent by the railroad company to settle for her injury, for her loss of time. (Counsel for plaintiffs objected to this line of testimony as incompetent on the ground that the release to which the same led up could not in this jurisdiction operate to divest the right of the husband of the female plaintiff for which he is now suing. The objection was temporarily overruled and an exception noted.) When he called at the house he asked for Mrs. Howard and was shown up to her room, where he found her in bed.

Q. Was any one else in the room? A. Yes, sir; there was an elderly lady there most of the time. It was broad daylight. The *room* was the ordinary light of a room. "I told Mrs. Howard I was there as the representative of the R. R. Co. to try and make good, as far as we could see, for her loss of time from the department in which, I think, she was a clerk. It resulted in my giving Mrs. Howard $200, and she signed the paper that I presented. After some talk Mrs. Howard seemed to think that she was willing to accept $200, which I paid her, and then she signed the paper.

Q. Did you read the paper to her? A. Yes, sir; I did, and I stated to her that in any transaction she had with me she must recollect that I was representing the railroad."

94 Cross-examination:

Q. How did it happen that you were attending to an attorney's business in connection with Mrs. Howard? A. Simply in accordance with the request of Mr. Wickham, who requested me to s[illegible]

some others here in Washington at the same time to settle with them.

Q. For what railroad company were you acting? A. The Newport News and Mississippi Valley Company.

Witness became surgeon of the Chesapeake and Ohio Railway Company in 1881 or 1882.

Q. Who were the officers at that time?

(Objection to this line of cross-examination overruled, and exception noted.)

The witness said: I think Mr. Huntington was president; I think Mr. Wickham was general counsel and Mr. Henry W. Fuller general ticket agent. When witness ceased to be surgeon of the Chesapeake and Ohio Railway Company he became surgeon of the N. N. & M. V. Co.; thinks the same officers were president, general counsel, and general ticket agent when the C. & O. Railroad Company went into the hands of a receiver. He presumes Mr. Huntington was still president and that the other officers remained the same; he was surgeon, and when the C. & O. Railway Company came out of the hands of the receiver he thinks the same officers continued right along, and witness presumes that the same were officers of the N. N. & M. V. Co.; he himself was chief surgeon. Witness did not know at the time he saw Mrs. Howard on the train the nature of the accident which had occurred; was with her most of the day. Five or six days afterwards he saw her in Washington; had the money to settle with her. From his examination of her on the train her injuries seemed to him to be slight. He thought
95 it was simply a bruise from which she would soon recover.

Q. If you had supposed that she had received injuries which would have resulted in Potts' disease, would you have offered her $200 in settlement? A. No, sir; I would not.

—. Did you not feel that in taking $200 in your pocket to settle with a woman under those circumstances you were going outside the line of your profession? A. Well, it was something that, as chief surgeon of the road, I had been in the habit of doing when I was requested to do so. I presume in this case it was simply from the fact that I was the only person connected with the road who knew Mrs. Howard.

Q. If you had before you the question of propriety of conducting even an insignificant business transaction with Mrs. Howard, would you voluntarily have selected that occasion and those circumstances in which to make that settlement? A. Well, sir, I don't know whether I would or not. It would have depended upon her condition to make a settlement.

Q. Would you today, Doctor, if you were going to settle the question of buying a horse that was worth fifty dollars, conduct the transaction with a women who had been injured and who was in bed? A. I think not, sir.

Witness did not recollect who was the other woman in the room; could not say whether Mrs. Warder was or was not the one. "I am

sure there was another lady. All I can say is she was an elderly looking lady."

96 Redirect:

Q. Did you tell Mrs. Howard that you were the surgeon of the C. & O. railway? A. No, sir; I do not think that I did; I am pretty sure that I did not, because I was not the surgeon of the C. & O. at that time.

Q. Did you discover any inability in Mrs. Howard to settle this case when you settled with her? A. No, sir.

Q. Did it occur to you that you were dealing with her at a disadvantage? A. No, sir; it never did. If it had, I would not have dealt with her.

Q. Did you ever say to Mrs. Howard that if she lost her place the company would take care of her or see her through, or anything of the kind? A. No, sir; I never did.

Recross-examination:

Q. Nevertheless you adhere to what you said a moment ago, that if you were going to settle a transaction of your own involving fifty dollars you would not choose that occasion to do it? A. No, sir; I presume not with a lady.

Mr. ROBINSON:

Q. When you say you would not choose that occasion do you mean to say that you discover any impropriety whatever in what you did? A. None whatever, sir.

97 And, further to maintain the issue on their part joined, the defendants called HENRY W. FULLER, who testified as follows: After it had been admitted by and between counsel that the original ticket purchased by the female plaintiff was now lost and could not be produced, a ticket was shown the witness and identified by him as form No. 758 C. This is the form of a first-class ticket such as would be sold from Washington to Louisville. A round-trip would be like this, except it would have on its face the letters "Ex.," representing "excursion." The return portion would be in all respects the same, except that the coupons would be reversed. This ticket was subsequently offered and received in evidence as containing the testimony of the witness upon this point and is as follows:

(It is stipulated that this original ticket shall be, and it is hereby, made a part of this bill of exceptions, but as it is too worn to be lithographed it shall be produced and shown to the appellate court in order that the comparative size and arrangement of its various printed matters may be seen by the appellate court.)

It is hereby stipulated that the original ticket produced at the trial may be photolithographed and inserted herein.

JAMES FRANCIS SMITH,
R. ROSS PERRY & SON.,
Counsel for Appellees.
LEIGH ROBINSON,
Counsel for Appellant.

Sept. 20, 1898.

(Here follows R. R. ticket, marked p. 97½.)

98 Washington to Louisville, Kentucky,

Via V. M., C. & O., E., L. & B. S., L. & N.

758 C.

Chesapeake and Ohio railway, good for one continuous first-class passage. Washington to Louisville, Kentucky, as per coupons attached when officially stamped, subject to the following conditions.

In selling this ticket for passage over other roads, this company acts only as agent and assumes no responsibility beyond its own line. If this contract and attached coupons are cancelled with agent's "L" punch, it shows that this ticket has been sold at a reduced rate and the holder hereof agrees with the respective companies over whose road such holder is to be carried, to use the same *on or before the expiration of date as designated by punch-marks in margin hereof.* And the holder hereof failing to comply with this agreement, any of said companies may refuse to accept this ticket or any portion of it and demand full local fare, which the holder agrees to pay.

If more than one date be cancelled, it will not be received for passage by conductors. None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding $100.

No stop-over check will be issued on this ticket.

H. W. FULLER,
General Passenger and Ticket Agent.

99 Issued by Chesapeake and Ohio railway on account of Louisville and Nashville railroad, one first-class passage, Lexington to Louisville.

This check is not good if detached.

Washington to Louisville, Kentucky, V. M., C. & O., E., L. & B. S., L. & N.

Issued by Chesapeake and Ohio railway on account of Elizabethtown, Lexington and Big Sandy railroad, one first-class passage, Huntington to Lexington.

This check is not good if detached.

Washington to Louisville, Kentucky, V. M., C. & O., E., L. & B. S., L. & N.

Chesapeake and Ohio railway, one first-class passage, Charlottesville to Huntington.

This check is not good if detached.

Washington to Louisville, Kentucky, V. M., C. & O., E., L. & B. S., L. & N.

Issued by Chesapeake and Ohio railway on account of Virginia Midland railway, one first-class passage, Washington to Charlottesville.

This check is not good if detached.

Washington to Louisville, Kentucky, V. M., C. & O., E., L. & B. S., L. & N.

100 Q. You have already testified that in November, 1886, you were the agent and representative of the Newport News and Mississippi Valley railroad, and that after that time the C. & O. went into the hands of a receiver. When it came out of the hands of the receiver who was the president of the C. & O.? A. M. E. Ingalls.

Q. Is he its president now? A. He is and has been ever since.

In November, 1887, Mr. Chapin was in the service of the receiver of the C. & O. railway and immediately prior to that time he was in the service of the N. N. & M. V. Co. The same is true of Mr. Frank Trigg. If the latter was here in November, 1886, he was in the service of the Newport News and Mississippi Valley Company, Eastern division. The words Piedmont air line form an advertising trade-mark applied to the Virginia Midland, the Richmond and Danville, and at present to the Southern railway.

Defendant's counsel then offered to prove by witness that it is the custom of railroad companies to stamptickets with the corporate names of their own companies over whatever corporate tracks the traveller may go and illustrate the proof by copies of tickets between Richmond and Washington, showing that when a ticket is bought from Washington to Richmond at this end it is stamped Pennsylvania road and when bought at the opposite end, over the same road, it is stamped Richmond, Fredericksburg and Potomac R. R. Upon objection the court said: If it is relevant, is it not a matter of public notoriety? Does not everybody know that the

101 Pennsylvania road will sell a ticket from here to San Francisco with coupons on it, and that a railroad company in San Francisco will sell you one all the way to Portland, Maine, clear across the continent? I think that it is a matter of public knowledge.

Mr. ROBINSON: "I accept that as a reason why I need not press the question further."

Cross-examination:

Q. Mr. Fuller, you have given in answer to a question from Mr. Robinson your employment at sundry times, but I wish to ask you about it a little more in detail. It has been given in evidence here that the Chesapeake and Ohio railway, as originally incorporated, ran from Phœbus, near Old Point, in Virginia, to the west bank

of the Big Sandy river, through the States of Virginia and West Virginia. A. Yes.

Q. Were you connected with the Chesapeake and Ohio at its organization? A. Oh, no.

Q. I think you testified yesterday that you became connected with it in 1882 or 1883? A. Yes, sir.

Q. Did it at that time have any business in Washington? A. No, sir; the Chesapeake and Ohio did not have any business here except—I will have to explain that the Virginia Midland then transacted the business and the Chesapeake and Ohio kept no agencies here.

Q. When did the Chesapeake and Ohio railway first begin to operate as a through line between Washington and Louisville or Washington and Cincinnati, either? A. I cannot give you
102 the date, but within eighteen months after my connection with the road—way back there.

Q. Prior to that time it had been simply a railroad operating between its own termini? A. Between Richmond and the western termini; it had not been built at Phœbus then.

Q. After that time it took upon itself the selling of tickets and the conduct of business as a through carrier, did it not, between Washington and Louisville or Cincinnati? A. Yes, sir; not at all the points you name, because it was some years before the road was completed.

Q. But at that time it did sell through tickets from Washington to Cincinnati? It had an office in Washington where it sold through tickets, did it not? A. Yes, sir.

Q. And it also had an office in Cincinnati where it sold through tickets? A. Yes, and in New York.

Q. Shortly after that it also sold tickets from Washington to Louisville and from Louisville to Washington, did it not? A. Yes.

Q. And it had an office in Louisville where it sold its tickets? A. Yes.

Q. This ticket has at the head of it, in large letters, "Chesapeake and Ohio railway," has it not? A. Yes, sir.

Q. And it has it also on each coupon? A. On each coupon; if there were a hundred coupons we would still have it.

By Mr. PERRY: It (the ticket) is offered as the exact coun-
103 ter- of the ticket Mrs. Howard had with this exception, that the coupons are in reverse order.

Q. It is in evidence, Mr. Fuller, that this ticket by reason of which suit is brought here was purchased in November, 1886, in Louisville, and that in the advertisement to which your attention was called the other day in the Louisville Courier-Journal an office was designated in Louisville as the office of the company? A. Yes; I saw the advertisement; I recognized the advertisement; yes, sir.

Q. Over what roads would a person travelling on that ticket in November, 1886, from Louisville to Washington pass? A. In de-

tail, first, eighty-four miles over the Louisville and Nashville railway.

Q. To what place? A. To Lexington, Kentucky; thence one hundred and forty miles from Lexington, Kentucky, to Huntington, West Virginia, over the Newport News and Mississippi Valley Company, Western division, as I have testified before; thence from Huntington to Charlottesville over the Newport News and Mississippi Valley Company, Eastern division, three hundred and twenty miles; thence from Charlottesville to Washington over the Virginia Midland. I think it was that time. Now, that has changed two or three times, and I had no connection with it. It was the R. & D. afterwards.

Q. If you are correct about that, how was it that a ticket sold in Louisville and taken up by the conductor of a train as good, received by him as good, would not contain any coupon over the Newport News and Mississippi Valley's line? A. As I understand your question, you ask why the form of ticket that we for-
104 merly sold had not been changed to read properly over these lines?

Q. That is what I meant to ask; yes. A. Owing to the fact that it is a very complicated matter to change an issue of tickets over railways, I have today if you permit me to say it, over six thousand forms of tickets. I have just spent seven months and six thousand dollars in changing the entire form, throwing out all this old stock and putting in a new, modernized form of ticket. The reason we did not do it was because it is rarely ever customary to change a whole issue. There are very many more complications about it than you have any idea. It is a fact, however, that we did not change them, and the ticket reads as you see it.

Q. Why was it that if the Newport News and Mississippi Valley Company was really operating this road from Lexington to Huntington in November, 1886, this folder which was shown you the other day did not have that road between Lexington and Huntington marked as the Newport News and Mississippi Valley road? A. For the reason that the Newport News and Mississippi Valley road was something that the public did not know anything about for years, whereas the Chesapeake and Ohio railway had been there for fifty or sixty years, and the general public knew where the White Sulphur Springs was and all those other places, and we just simply let it go along.

Q. The advertisement, then, in the name of the Chesapeake and Ohio railway was used for the purpose of attracting the public? A. For the purpose of an advertisement; yes, sir; a trade-mark; merely for that purpose.

Q. Who was operating the line from Huntington to Lex-
105 ington in the years 1882, 1883, 1884, 1885, and up to the first of January, 1886? A. The E., L. & B. S. railway; that was operating it; but it is rather difficult to answer that question, sir, directly. The traffic officials, of whom I was one, representing the passenger department, extended over the entire system, over that part of the E., L. & B. S. road which was built to make an outlet for

the Chesapeake and Ohio railway. Am I proceeding beyond what your question calls for?

Q. You were examined as a witness on the former trial of this case, were you not? A. Yes, sir.

Q. Were you asked this question on that trial, "Just before you ceased to be employed by the Chesapeake and Ohio railway and went into the employ of the Newport News and Mississippi Valley Company, where did the Chesapeake and Ohio railway run"? Is it not a fact that you stated at the former trial, in answer to that question, this: "At that time they had this run from Huntington to Lexington; at that time it extended from Lexington to Newport News and Old Point Comfort"? Did you not make that answer? A. In reply to a question where the Chesapeake and Ohio ran?

Q. Yes. A. If I did I made a very careless reply, sir.

Q. Let us see to what extent your carelessness extended. I read again by question and answer:

"Q. It had at that time extended from Lexington, Kentucky, to Newport News? A. Under an arrangement with those railroads.

106 Q. And what was that arrangement? A. Simply the Elizabeth-, Lexington and Big Sandy railroad was contracted to turn over and do business with the Chesapeake and Ohio, but it was no part of the Chesapeake and Ohio, though."

The WITNESS: May I interrupt you there?

Mr. PERRY: I would sooner read this through, and then you will have an opportunity to come back to this point.

"Q. Just before you ceased to be employed by the Chesapeake and Ohio railway and became employed by the Newport News and Mississippi Valley Company the Chesapeake and Ohio had been operated and run from Newport News to Lexington, Kentucky? A. Yes, sir; we had been operating that piece of road, the Elizabethtown, Lexington and Big Sandy road. We had not been operating it as the Chesapeake and Ohio, though.

Q. Why do you say we had been operating it? A. Simply it was turned over to us to operate.

Q. Turned over to whom? A. Turned over to the officers of the Chesapeake and Ohio for the purposes of economy in operation."

Mr. PERRY: Did you or not testify to that? A. Yes, sir. I will let that testimony stand; that is right.

Q. That is right? A. Yes, sir; I made that testimony. I remember very distinctly.

Q. I do not know that I asked you yesterday, but I will ask you now, in order that there may be no mistake about it. When you went into the employ of the Chesapeake and Ohio railway

107 they had their office in Richmond and not here? A. In Richmond, Virginia—that is, the general offices.

Q. Then they came here and opened an office at 6th and Pennsylvania avenue? A. No; not the same offices; entirely new and separate offices; simply as a local ticket office here. I referred to

the offices in Richmond as the general offices of the company. This office here was simply a local ticket office to sell tickets only.

Q. Where they sold through tickets? A. Yes, sir; tickets of all kinds.

Q. And attended to through business? A. Yes; all business; ticket business; yes, sir.

Q. You continued as the general ticket agent of the Chesapeake and Ohio railroad until what time, do you say? A. Down to date. The company retained me through all these various managements.

Q. You remained as that officer down to July, 1886, anyhow, did you not? A. At the time the Newport News and Mississippi Valley Company leased the Chesapeake and Ohio and took it in.

Q. And that was in July, 1886? A. July, 1886; yes, sir; the Eastern division.

Q. You spoke of Mr. Chapin and of Mr. Frank Trigg? A. Yes, sir.

Q. Were they not employed by the Chesapeake and Ohio railway prior to the first of July, 1886? A. Oh, yes.

Q. How long had Mr. Trigg been in its employ? A. Mr. Trigg was with me in Richmond for a long while, and I sent him here as local agent. I do not remember the dates.

108 Q. And Mr. Chapin had been also? A. Mr. Chapin was my chief clerk in Richmond for years when I first went on the road. Then, afterwards, Mr. Trigg jumped over Niagara falls, and then I put Mr. Chapin in his place. I do not remember the date.

Q. And Mr. Chapin succeeded Mr. Trigg then? A. Yes.

Q. In behalf of the Chesapeake and Ohio railroad, did he not? A. I think he came here, sir, before the formation of the Newport News Company. I cannot say.

Q. When the Newport News Company formed you went over to it as general manager, did you not? A. As general passenger agent.

Q. And also Mr. Chapin? A. All my staff, sir.

Q. All your staff? A. Every one in my employ went along with me.

Q. And the same office continued along here in Washington? A. Precisely.

Q. With the same employees? A. The same.

Q. When the company went into the hands of a receiver and went back into the Chesapeake and Ohio railroad you continued as the general ticket agent? A. Yes, sir; in the new company.

Q. And Mr. Chapin continued, did he not? A. Mr. Chapin left the service of the company before that change.

109 Q. Do you know just how long the Chesapeake and Ohio was in the hands of a receiver? A. No; I could not tell you. I would not attempt to answer such a question. It is not in my department at all.

Q. I just ask you generally, when the Chesapeake and Ohio went into the hands of a receiver it had its trackage and rolling stock still, did it not? A. Oh, yes, sir.

Q. How did they get into the hands of a receiver? There is in evidence here a lease from the Chesapeake and Ohio railroad to the Newport News and Mississippi Valley railroad of all the trackage and all the rolling stock for two hundred and fifty years. Do you know how when the receiver was appointed in 1887, not a year after this lease was made, the rolling stock of the Chesapeake and Ohio got into the hands of the receiver? A. I do not like to appear to be jocular, but at the same time that is entirely outside of my line. I do not know anything about it. That is a legal question, and one about which I, as being connected with the traffic line of the business, know nothing.

Q. You were general business agent of the Chesapeake and Ohio railroad when it came out of the hands of the receiver? A.

110 I had nothing to do with that.

Q. But you were the general ticket agent? A. Yes, sir.

Q. And you sold tickets? A. Yes, sir.

Q. And the tickets would not have been good unless there were trains running, would they? A. No, sir.

Q. So that the Chesapeake and Ohio, when it came out of the hands of a receiver, must have had trains and rolling stock? A. Oh, there were trains running always.

Q. There were always trains running? A. There were always trains running.

Q. And the Chesapeake and Ohio ran those trains, did it not? A. Over that portion after it came out of the hands of a receiver—yes.

Q. It took the whole management of the road, did it not? A. After it came out of the receiver's hands—yes, sir.

Q. And of course it must have had trains? A. It did not take it out of the E., L. & B. S. railroad for some time.

Q. I am not talking about that; I am talking about the Chesapeake and Ohio railroad, which went into the hands of a receiver in 1887, I think it was, Mr. Robinson.—September?

Mr. ROBINSON: October.

Mr. PERRY: It went in in 1887 and came out when?

Mr. ROBINSON: I think two years afterwards.

A. About two years afterward.

Mr. PERRY: In 1888?

Mr. ROBINSON: Yes.

111 By Mr. PERRY:

Q. Now, to ask you again, you know, of course, that the Chesapeake and Ohio railway in 1888 was running trains over its road in Virginia? A. Oh, yes.

Q. Now, do you know how it was that those trains got back from the possession of the Newport News and Mississippi Valley Company into the possession of the Chesapeake and Ohio Company? A. No, sir; I cannot tell you the legal process by which they were returned. I just know that a certain amount of equipment was returned to us; was repainted and relettered and all that sort of thing.

Q. Do you know how it was that the lease of a railroad like the Chesapeake and Ohio, involving its trackage and its rolling stock, could be made to the Newport News and Mississippi Valley Company for two hundred and fifty years at a rental of only five thousand dollars a year? A. No, sir; that is too hard for me. I cannot answer that question, sir. I know nothing about it.

Q. Do you know how it happened that the Elizabethtown, Lexington and Big Sandy Railroad Company, which has a lesser trackage than the Chesapeake and Ohio, and, I suppose, a smaller rolling stock, could also happen upon exactly that same rental, five thousand dollars a year? Do you know how that happened? A. Oh, no, sir; I cannot explain that. I cannot possibly know about any of those things, sir. I am simply the business end of the road. It is simply impossible for me to know these inside affairs. I have no interest in them.

112 Q. I do not know whether I asked you yesterday if you knew what had become of the Newport News and Mississippi Valley Company? A. I do not know whether you did or not; but I could not answer.

Q. It disappeared so completely that you could not answer that question? A. I could not answer that, sir. That is also out of my department.

Redirect:

Q. You say that upon your appointment by the N. N. & M. V. Co. you carried your staff with you. How did your staff happen to go with you? A. I employ all of the employees of the passenger department of our railways.

Q. When you became an employee of the N. N. & M. V. Co. did you employ Mr. Trigg and Mr. Chapin? A. Yes; practically so; certainly.

Q. Did you receive any circular from the N. N. & M. V. Co. employing you, when it became the lessee? A. A circular was issued announcing the officials. My name appeared as the general passenger agent.

Mr. PERRY: If there is any circular it ought to be produced.

The COURT: Yes; we ought to have the circular on that subject.

Two papers, marked respectively H. W. F. No. 1 and H. W. F. No. 2, were then shown witness and identified by witness as being copies of the circular received by him.

Mr. ROBINSON: I offer these circulars in evidence as the circulars which were issued, turning over the company from the lessor
113 to the lessee, and the entry of the lessee upon the premises, and offer to read them in evidence.

The COURT: I hear no objection.

Mr. PERRY: These circulars are objected to if it is attempted to offer their contents in evidence as proving the truth of their contents.

The COURT: To show that this thing was done?

Mr. PERRY: That that thing was done. Of course, I have no objection to them in that aspect.

The COURT: At any rate, I think that is all they prove.

Mr. ROBINSON: In order to show that this thing was done I will have to read them to show what was done under them.

The COURT: The circular proves itself—that is, that such a circular was issued. I do not know what is in it, but if it recites that the Newport News and Mississippi Valley railroad took possession of the rolling stock it would not prove that.

Mr. ROBINSON: No; I do not think it has anything about that.

The COURT: That is what Mr. Perry means, I suppose.

Mr. ROBINSON: No; it has nothing about the rolling stock in it. If it is in I will leave it out.

Mr. PERRY: It is not evidence of the truth of anything.

The COURT: No; it is not evidence of the truth of anything that is recited in it.

Mr. ROBINSON: No; but it is evidence that what is here was received by him and he acted on it.

The COURT: That this circular was issued and received by him.

Mr. Robinson thereupon read said papers to the jury:

114 H. W. F. No. 1.

Newport News and Mississippi Valley Company.

Office of the president, No. 23 Broad street.

NEW YORK, *January 27th*, 1886.

Circular No. 1.

This company, having leased, from February 1, 1886, the Elizabethtown, Lexington and Big Sandy railroad, and the Chesapeake and Ohio and Southwestern railroad, these properties will be operated for the present under the titles of the Eastern division and the Western division, respectively.

All matters pertaining to the operation of the leased properties lying east of Louisville, Kentucky, will be under the jurisdiction of the officers appointed for the Eastern division, and those pertaining to the leased properties lying west of Louisville, Ky., will be under the officers of the Western division.

The business of the company will, under the direction of the president, be conducted by the following officers, they nominating to the president for confirmation the necessary officers for their respective departments:

A first vice-president, charged with the general supervision of matters pertaining to the financial affairs of the company, aiding the president in such other business as may be committed to him, and in his absence act for him.

A second vice-president, charged with the general executive business and the operation of the leased properties of the Eastern division.

A third vice-president, charged with the general executive business and the operation of the leased properties of the Western division.

115 A secretary and treasurer, who shall have charge of all moneys and securities belonging to the company, and the general control of all matters relating to the disposition of the company's funds at the local offices.

A general counsel, charged with the general control of the company's legal matters.

An assistant to the president, to whom shall be assigned in addition to such duties as may be from time to time entrusted to him by the president, the special duty of assisting the president in matters pertaining to the physical operation of the roads.

A controller, charged with the supervision and direction of all the accounts of the company and the accounting department.

In accordance with the above organization, the following appointments have been made:

I. E. Gates, first vice-president, New York.

W. C. Wickham, second vice-president, Richmond, Va.

John Echols, third vice-president, Louisville, Kentucky.

I. E. Gates, secretary and treasurer, New York.

Chas. H. Tweed, general counsel, New York.

William Mahl, ass't to the president and controller, New York.

All other officers and agents of the leased properties will be continued until further notice from the officers of their respective departments.

Communications in respect to the several departments of the company should be addressed as above.

C. P. HUNTINGTON, *President.*

116 H. W. F. No. 2.

Newport News and Mississippi Valley Company.

Office of the president, 28 Broad street.

NEW YORK, *July 1st*, 1886.

Circular No. 5.

The Newport News and Mississippi Valley Company having leased the Chesapeake and Ohio railway, to take effect this day, the jurisdiction of the officers of the Eastern division of this company is hereby extended over said leased property.

C. P. HUNTINGTON, *President.*

Q. You stated that you had an office in Washington, and I think you also stated that you had one in New York, in your cross-examination. Did your office in New York sell tickets? A. Yes, sir.

Q. To what points? A. To any points you want—California.

Q. Your local office here sold tickets to what points? A. Oh, to California; any distance to which railroads reach. We all sell tickets that way.

Q. Did the E., L. & B. S. R. R. operate trains to Huntington? A. That is, before the formation of the N. N. & M. V. Co., why certainly they did.

117 Q. In your former testimony which was read to you, you said: The E., L. & B. S. R. R. was *contracted* to turn over and do business with the C. & O. What did you mean by that? A. I think the notes were wrong. I never could have made such a statement. I suppose instead of *contracted* it should have been *constructed*. It was constructed for the purpose of forming a through route to Louisville.

Q. State what is your version of the relations between the C. & O. and the E., L. & B. S. R. R. in 1885, prior to any lease to the Newport News and Mississippi Valley Company. A. My understand—was, sir, as a traffic officer, that the E., L. & B. S. railway was an entirely separate organization from the C. & O. I know it had separate stock. I saw its stock. I know it had separate bonds, and I believed, and I believe now, that it was a separate organization, and that it was constructed for the purpose, as it was explained to me, of forming an outlet through Kentucky for the C. & O. railway over which it should do business. I and other traffic officials were appointed in charge of the business end of the road—*i. e.*, I had charge of the passenger business, the general freight agent had charge of the freight business, and the road had its own separate officers in every other department, as I understand it, except the traffic department, and, I think, its president. The Elizabethtown, Lexington and Big Sandy railroad ran its trains over a small piece of track from the Big Sandy river to Huntington, using thereby a portion of the C. & O. track—a small portion—eight or ten miles, which lay in West Virginia.

Q. Did the receipts from that portion of the track go to the E., L. & B. S.? A. No; the business was divided *pro rata* per mile.

118 We gave them 140 miles in the prorate of the through ticket.

(Counsel for the defendant thereupon offered in evidence the ticket referred to by the witness as being a correct statement of the testimony of the witness.)

Recross-examination:

Q. You said, if I understood you, in answer to a question of Mr. Robinson, that the Elizabethtown, Lexington and Big Sandy railroad was constructed in order that a through route might be opened for the Chesapeake and Ohio? A. I stated that that was my understanding of it.

Q. That was the object of the construction of the road? A. Yes, sir; I think to form a through route for the Chesapeake and Ohio.

Q. In 1882, 1883, 1884, 1885, up to January, 1886, how many trains did the Chesapeake and Ohio run over this Elizabethtown, Lexington and Big Sandy railroad a day? A. I do not think, sir, the Chesapeake and Ohio ever operated a train over that piece of track. We ran through cars over it—that is, they took our through cars and handled them through.

Q. Exactly. A. Two a day each way.

Q. Your trains were hauled over that road? A. Yes; in fact,

the through trains from Washington city. I remember the through day car.

Q. Were not the freight trains of the Chesapeake and Ohio hauled over that road? A. Oh, yes.

Q. Who sold the tickets? A. The agents of the Chesapeake and Ohio or the Newport News Company, as the case might be.

119 Oh, no; you refer to that ticket; the Chesapeake and Ohio.

Q. You said in your examination that you made up those tickets for the Elizabethtown, Lexington and Big Sandy railroad. A. Yes.

Q. How came it that you, acting for the Chesapeake and Ohio, made up tickets for that road? A. I was, as I explained a while ago, the general passenger and ticket agent over that road of the Chesapeake and Ohio, and also about that time of the Kentucky Central railroad, if I may explain, and also the lines south of Louisville—all of Huntington's lines; I operated over four different roads.

Q. You said there was some other employee of the Chesapeake and Ohio railroad. A. The freight department, I think.

Q. He operated, too, the Chesapeake and Ohio road? A. The same way; yes sir. I think perhaps one or two other officers; I do not remember.

Q. All the rolling stock that went over the road with those trains was Chesapeake and Ohio rolling stock, was it not? A. No, sir; because the Virginia Midland here put in a portion of the rolling stock for the through trains to Louisville; the Louisville and Nashville put in some cars; the C. & O. furnished some cars; the E., L. & B. S. furnished some cars, with a view to equalizing the mileage that was collected and paid.

Q. Who collected the money that was paid? Did not the Chesapeake and Ohio collect it? A. Yes, sir; we divided it out among the different lines.

120 Q. And who had charge of these trains? A. The various superintendents over whose roads they ran.

Q. On the first of January, 1886, what change was made with respect to the persons who had charge of the trains? A. In January, 1886?

Q. On the 31st of December, 1885, this arrangement which had existed since 1882 and which was to continue for five years, according to Mr. Wickham's testimony, ceased and a new arrangement went into effect. *Q.* Now, I want to know what change was made in the persons who operated these trains on the 31st of December, 1885, and the persons who operated the same trains on the 1st of January, 1886. What change was made, if any? A. I do not know that I can remember that.

Q. It has been testified to by General Wickham in this case and, as I understand, by yourself, that down to the first of January, 1886, the Newport News and Mississippi Valley Company had not anything to do with the Elizabethtown, Lexington and Big Sandy Railway Company? A. No, sir.

Q. And that there was a certain arrangement between the Chesa-

peake and Ohio and the Elizabethtown, Lexington and Big Sandy railroad? A. Prior to 1886.

Q. Up to the first of January, 1886. Now, I want to know what change was made with respect to the persons who managed these through trains that went over the Elizabethtown, Lexington and Big Sandy railroad on thirty-first of December, 1885, and the same persons in the first of January, 1886, the next day—what
121 change was made? A. On the next day—I am not aware that there was any change made between the thirty-first of December and the first of January; that is one day. I could not, of course, tell you that. In fact, I could not answer that question at all.

Q. You do not know of any change? A. I know of none. I could not reply to that question.

Q. Do you know of any change that was made during the year 1886 in the persons who had been running those trains? A. No; I could not answer that question.

Counsel for defendant then read in evidence from the record of the last trial the copy of the voucher signed by the plaintiff. Counsel for plaintiffs made no objection on the ground that said paper was a copy of the said voucher, but objected to the same as incompetent, inasmuch as it could not operate in this case to divest the right of the plaintiffs. The objection was temporarily overruled and an exception noted.

Copy.

Newport News & Mississippi Valley Company to Mrs. Laura P. Howard, Dr.

Address, 1806 Eleventh St. northwest, Washington, D. C.

1886.

Nov. 24. For the following, as per original bill rendered, filed in the auditor's office and certified to by W. T. Wickham, ge. sol'r:

To gratuity allowed in full of all claims on account of personal injury near Soldier Station, Kentucky..... 200 00

122 Audited: C. H. BRANSON, *Auditor.* Approved: ——, *Supt.* Approved: W. C. WICKHAM, *2nd Vice-Pres't.*

Received, November 24th, 1886, of the Newport News & Mississippi Valley Company two hundred $\frac{0}{100}$ dollars in full compromise, satisfaction, and discharge of all claims or causes of action to me accrued against them, their lessors or predecessor companies, and particularly of all claims or causes of action arising out of personal injuries received by me while a passenger on the cars of the com-

pany near Soldier Station, Kentucky, which occurred on the night of 16th November, 1886.

Witness my hand and seal.

LAURA P. HOWARD. [SEAL.]

Witnesses:

C. W. P. BROCK.

And, further to maintain the issues on *their* part joined, the defendant, by its counsel, read in evidence the deposition of C. BEUTGENBACH, taken March 23d, 1893, as follows:

Witness a resident of Louisville, Kentucky. In November, 1886, was assistant ticket agent of the Newport News and Mississippi Valley Company and had charge of the sale of tickets in Louisville. Witness was shown and recognized the blotter or register used to register the sale of tickets in the N. N. & M. V. Co.'s office
123 and examined the entries therein, beginning at November the 11th and including Nov. 16th, 1886, showing the number of tickets sold from Louisville to Washington city between those dates, viz: One on the 11th, form V. M., 11 A., No. 1385; on the 13th one, form V. M., 11*a*, No. 1386; on the 16th three, form V. M., 11*a*, Nos. 1389, 1390, 1391. All are entered in handwriting of witness excepting 1386, and witness is satisfied the balance were sold by him personally; 1386 was entered by Mr. Joseph Gordon, whose duties were to assist witness. Entries were made on date of sale. Witness then proved the form of a Newport News and Mississippi Valley Company, Eastern division, form V. M., 11 A, ticket, and stated the same to be the same form of ticket sold by him as above spoken of. The same, filed as a part of the deposition and marked "Exhibit A," was read in evidence to the jury.

Q. Was or not this the only form of ticket sold in that office for the month of November, 1886? A. It was.

Q. What business are you now engaged in? A. Hotel business.

Q. Are you in any way connected with the railroad business? A. No.

Q. How long has it been since you severed your connection with the Newport News and Mississippi Valley Company? A. In June, 1890, when I was appointed southern passenger agent of the C. & O. railway, which position I held until Octo. 1st, 1891. Since then witness has had no connection with the R. R. business.

124 "EXHIBIT A."

Form V. M., 11 A.

Via L. & N., N. N. — M. V., V. M. div.

To agents:

Fold the coupons, and while folded punch the destination in them, &c.

Newport News & Mississippi Valley Co. (E. D.).

Good for one first-class passage to point designated by punch-marks on the contract and coupons attached when officially stamped.

Subject to the following limitations:

1st. In selling this ticket this company acts as agent and is not responsible beyond its own lines over which it reads.

2nd. It is subject to the stop-over regulations of the lines over which it reads.

7th. No agent of any of the lines has any power to modify any of the conditions named in this contract. Each company will be responsible for loss or damage on its own line.

H. W. FULLER,
Gen'l Passenger & Ticket Agent.

Richmond & Danville R. R. (Va. Midland div.), Charlottesville to station designated in contract and coupons.

Names of stations: Orange, Lynchburg, &c. Issued by
125 Newport News & Mississippi Valley Co. (E. D.), via L. & N., N. N. & M. V., V. M. div.

Newport News & Mississippi Valley Co. (E. D.).
Lexington to Charlottesville.
Names of stations as in foregoing coupon.
Via L. & N., N. N. & M. V., V. M. div.
Louisville & Nashville railroad.
Louisville to Lexington.
Names of stations as in first coupon.
Issued by Newport News & Mississippi Valley Co. (E. D.).
Via L. & N., N. N. & M. V., V. M. div.

Last coupon.

Not good for passage
To R. & D. R. R. (V. M. div.); local punched.
Names of station as in first coupon.

Agent's stub.

Via L. & N., N. N. — M. V., V. M. div.

126 The witness HENRY W. FULLER was then recalled and shown the foregoing ticket, proved by the deponent Bentgenbach, and asked whether that was the form of ticket which, under

his supervision and superintendence, would have been issued by the Newport News and Mississippi Valley road in November, 1886, or at any time prior to that.

A. This is a ticket issued by me for N. N. & M. V. road. The witness then proceeded: I would like while I am on the stand to make an explanation as to a term that I am said to have used when on the stand before, where I am said to have used the word "operated." I want to explain that I simply meant to use that term in connection with the operation so far as my department is concerned. Of course, I could not attempt to speak beyond that, the issuing of tickets over that road, which is the extent of my jurisdiction and the extent of my department, practically.

Q. And by operation you meant the issueing of tickets over the road? A. Yes; that is all I meant to refer to.

And, further to prove the issues on *their* part joined, the counsel for defendant read in evidence the deposition of W. U. CARR: Witness is at present a resident of Ashland, Boyd county, Kentucky, and a conductor on the C. & O. railway. In 1885 was engaged in breaking on local freight on the Lexington and Big Sandy railroad from Huntington, West Virginia, to Morehead, Kentucky. In the spring of 1886 the Newport News and Mississippi Valley Company took the E., L. & B. S. Railway Company and operated it, and witness ran as local brakemen on local freight until December 16th, 1886, when he was promoted to conductor, and ran first through freight, then local freight, until March 5th, 1887; was then
127 out of employment until the fall of 1888; was then reinstated in that year and promoted to run passenger trains until April 1st, 1891, for the Newport News and Mississippi Valley Company.

Q. From the spring of 1886 until March, 1887, you say you were working for the N. N. & M. V. Co.? A. Yes, sir.

Q. During the whole of that time what road in Kentucky did the Newport News and Mississippi Valley Company operate? A. The Elizabethtown, Lexington and Big Sandy R. R., from Lexington, Ky., to the Big Sandy river.

Q. What was the western terminus and what was the eastern terminus of the E., L & B. S. division of the N. N. & M. V. Co. in the fall of 1886? A. Lexington, Kentucky, western terminus, and Huntington, West Virginia, the eastern terminus.

Q. How were cars and engines and coaches operated in 1886 over the E., L. & B. S. road between Huntington and Lexington marked? A. The cars were marked Newport News and Mississippi Valley, Eastern division; also the engines, those that they had changed. When I was discharged there were a good many E., L. & B. S. cars.

Q. Did the engine of the E., L. & B. S. or N. N. & M. V. in 1886 go west of Lexington, Kentucky? A. No, sir; a Louisville and Nashville or L. & N. engine was used. In the fall of 1886 the conductor and trainmen of the L. & N. R. R. running in and out of Lexington were often seen by witness. Their caps had letters designating their positions, and also L. & N. on their badges, and

the trains were handled by them up to the first day of April, 1896.

We commenced running into Louisville the first day of
128 April two years ago this month.

Cross-examination:

Q. You went into the service of the N. N. & M. V. Co. in the spring of 1886? A. I went into the employ of the E., L. & B. S. in 1884 and was in the employ when the N. N. & M. V. took charge.

Q. Did you receive any formal notice of the change? A. Only the bulletin put upon board and the change of the name of the cars.

Q. You continued to get your pay the same way as before, did you not? A. Yes, sir; the pay-car came around; them same system and the same people. Mr. Patterson was the paymaster.

Q. Before the spring of 1886, before the time the Newport News and Mississippi Valley Company took it, did the Chesapeake and Ohio have anything to do with the line you were — just immediately before? Did the C. & O. have anything to do with the operation and management of the line you were running on? A. I could not say. We always understood it as the E., L. & B. S. division. The men called it that before the Newport News and Mississippi Valley took charge.

Mr. C. W. Smith was general manager of the property when Mr. Dunn was superintendent. Mr. Dunn was superintendent of the Newport News and Mississippi Valley; don't remember whether he had any connection with the road before the Newport News and Mississippi Valley came into existence. Witness was a freight conductor at that time.

And, further to maintain the issues on *their* part joined,
129 the counsel for the defendant read in evidence the deposition of F. B. Enslow: Witness is of counsel for the C. & O. Railway Co. in the State of West Virginia; in 1886 was a practicing attorney in Huntington, West Virginia. In this year the road between Charlottesville, Virginia, and Huntington, West Virginia, was operated by the N. N. & M. V. Co. The last-named company also operated the road from Huntington to Lexington, Kentucky, from January, 1886, until some time (I believe) in 1892.

Cross-examination:

Q. Is it not a fact that the management of the business remained the same? A. It did not remain exactly the same, although Mr. Huntington at that time owned the controlling interest in the stock, as I understand it, of both the railway company and the N. N. & M. V. Co. Prior to the lease C. P. Huntington was president of the railroad, and the entire operation of the road was controlled through the Richmond office. After the lease the N. N. &. M. V. Co. took charge of it; new and additional officers were appointed at New York, to whom the Richmond officers, as I now remember, reported.

Q. Well, was there any change made in the actual operating force of the road—the physical force? A. My impression is that

the general manager was changed about that time, but as to that I am not certain as to the date. There was a comptroller appointed in New York, as I now remember, to whom the auditor and the treasurer reported, and the funds of the road were handled through the New York office. The actual operating force of the road—the men engaged in the transportation, engineering, clerical, and
130 law departments—remained about the same, although there were some changes being made all the time.

Q. As to all these matters with respect to these three corporations, viz., the C. & O. Railway Company, the N. N. & M. V. Co., and the E., L. & B. S. Co., in respect to their termini and the relations they bore to each other in 1886 and prior thereto, would not Mr. Wickham be the person best qualified to give information? A. He would undoubtedly be better qualified that I would be.

Q. What road or company operated the line of road between Huntington, West Virginia, and Lexington, Kentucky, that is now operated by the Chesapeake and Ohio, in 1886? A. Am not certain when the Newport News and Mississippi Valley Company commenced the operation of the road from Huntington to Lexington, but my memory is that it was in the early part of January, 1886, until some time, I believe, in 1892.

Q. Immediately previous to January, 1886, what road or company operated the road between these points? A. I can't say as to that. Our salary prior to the year 1886 and all expenses were charged to the Chesapeake and Ohio Railway Company and were paid to us through the then chief attorney of the Chesapeake and Ohio Railway Company at Charleston.

Q. Is the Newport News and Mississippi Valley Company in existence now? A. I am not informed as to whether it has kept up its corporate existence or not.

Q. The lease was for a period of two hundred and fifty years, was it not? A. The lease will speak for itself.

131 Q. Do you know what has become of the lease? A. I never saw the lease and do not know what has become of the lease or the term.

And, further to maintain the issues on its part joined, the defendant's counsel read the deposition of C. L. ROBINSON: Witness is a locomotive engineer and had been for 22 years prior to April 4th, 1893, having been out of employment two years—in 1883 and 1884.

Q. On what road were you running in 1886? A. On the M. V. called the Newport News and Mississippi Valley Co. or the E., L. & B. S. R. R. In November, 1886, his run was between Huntington, W. Va., and Lexington, Ky., and he was running the train on the night of November the 16th, 1886, on which the accident at Soldier occurred. The accident occurred about two o'clock in the night on the morning of the 17th. Witness went back up the track to see what the cause was, but didn't see anything wrong. Some twelve or fourteen were hurt, some slightly injured, some worse. Capt. Paul I thought the worse injured. The train had been inspected

before it left Lexington. Witness could see nothing wrong about the track.

Q. What was the apparent condition of the engine and cars, and so on, when you left Lexington and all along in the hauling of the train? A. All right, sir. I never noticed any trouble at all; nothing wrong.

Q. At points where the cars are inspected, how are you governed as an engineer about leaving or knowing when the inspector has completed the examination? A. We go by a signal used by the car inspectors. They have a blue light they place on the platform.

132 Q. Is there a rule of the railroad company regulating that? A. Yes, sir; here is the rule. I don't recollect the number of the rule; it is in this book.

Q. Is this the rule that was in effect on the 15 and 16th of November, 1886? A. We had the rules printed in a different form, but the amount to the same. It used to be in the old time-card. All our instructions were at that time on the time-card. It was not in book form, and it was the same as this rule, with the exception, Mr. Paul says, it was a green caution signal instead of a blue.

Q. Have you one of the old schedules upon which this rule is? A. No, sir.

Defendant offers rule of the Chesapeake and Ohio Railway Company on page 13, under Train signals, of Book of Rules, dated January 1st, 1891; to all of which the plaintiffs objected.

Q. On that night until that signal was removed from the train after the inspection did you pull out until after it was removed? A. No, sir.

Train number 4 consisted that night of two Pullman cars, a first-class car, a smoker, and baggage car, I think.

On cross-examination:

The cars were inspected by the car inspectors at Lexington. The first-class car left the track first: that is the supposition. Two cars followed this car. Witness did not examine further than to look at the track to see that there was nothing wrong in that.

133 And, further to maintain the issues on their part joined, defendant, by its counsel, read the deposition of J. A. PAUL: Witness resided April 4th, 1893, in Lawrence Co., Ohio, about three-quarters of a mile from Huntington. His present occupation is farming. In the year 1886 was working as conductor on a railroad; had been railroading for some five or six years prior to that time. In November, 1886, was running on the E., L. & B. S. road, the Newport News and Mississippi Valley Company.

Q. When you say the E., L. & B. S. railroad and the Newport News and Mississippi Valley Company what do you mean? A. I

mean that the E., L. & B. S. railroad was operated by the Newport News and Mississippi Valley Company.

Witness was conductor on the train coming from Lexington, Kentucky, to Huntington, West Virginia, on the night of Nov. 16th or morning of November 17th, on which the accident occurred at Soldier, Ky.; derailment of the sleeper and first-class car and the rear trucks of the smoking car. The first thing I noticed was a rock of the car. I had my tickets laying out on the marble slab in the gentlemen's end of the car, making out my report or getting ready to, and the sleeper made a lurch, and then I knew something was wrong. I grabbed for the bell-cord, but I don't remember of pulling the cord; the car turned just as I raised to my feet; I don't think I ever got hold of it. The train was right on time, running about twenty or twenty-five miles an hour. There must have been twelve or fourteen who were injured. Witness was badly injured himself, and in consequence did not make any examination. The engineer that night was Mr. C. L. Robinson. The cars were inspected at Lexington and at Winchester, and I think at Mount Sterling.

134 Q. Do you remember the name of the first-class passenger coach that was derailed? —. It was a Piedmont Air Line car.

Cross-examination:

Witness saw them inspecting the train at Lexington; it was a part of his business to do so, but he could not speak with equal positiveness of memory as to Winchester and Mount Sterling. Witness was fixing to make off his report; had his tickets all laid out on the marble slab of the wash-basin; had not assorted them.

The defendant next called G. W. CASTLE, who testified as follows: I am employed in the Treasury Department, in Washington city, and at present reside here. On the night of November 16th, 1886, witness came through from Cincinnati to Catlettsburg. Witness was watching for the train coming in and had occasion to see what the train was.

Q. What was the lettering on it? A. Newport News and Mississippi Valley Co. Another train passed by while witness was waiting, belonging to the Kentucky Central. The train which witness took was the one on which the accident occurred at Soldier.

Cross-examination:

Winchester is on the line of the E., L. & B. S. road. It was about the middle of the night when the train came by. The first time witness testified in this case was in December, 1896.

Counsel for defendant offered and read in evidence the check with which Dr. Meredith Clymer was paid for his services in examining the female plaintiff as follows:

135 Newport News and Mississippi Valley Co.

No. 5224. NEW YORK, *May* 18, 1887.

National Bank of Commerce in New York

Pay to the order of F. H. Davis or A. K. Vandeventer two hundred dollars.

$200.00. I. E. GATES, *Treasurer.*

Endorsed on the back: Pay to the order of Dr. Meredith Clymer. A. K. Vandeventer. For deposit, Meredith Clymer.

And underneath this admission: Howard *vs.* C. & O. Co., No. 28242.

It is admitted that this check was received by Dr. Clymer in payment for services in Howard case. Dr. Clymer's endorsement is admitted.

JAMES FRANCIS SMITH,
Of Counsel for Plaintiffs.

Defendant's counsel then offered and read in evidence a duly certified copy of section 53 of chapter 54 of the Code of West Virginia, as the same was enacted February 5th, 1883, and remained in effect unamended until February 22nd, 1889, attested March 28th, 1898, by the secretary of state of West Virginia, with the great seal of the State affixed thereto; so much of which as is relevant to this case being as follows:

"No railroad corporation owning or operating a railroad wholly or in part within this State shall consolidate its capital stock with any other railroad running a parallel or competing line, with-
136 out the consent of the legislature; but any such railroad corporation, whose line of railroad is made, or is in process of construction, may merge, or consolidate with, or lease its railroad, or any part thereof, for a term of years, to any other corporation owning or operating any connecting line of railroad, whose line of road is completed, or is in process of construction, wholly or partly within this or an adjoining State, in order to make a continuous line of railroad, to be run and operated with or without changes of cars, or break of bulk or exchange or transfer of passengers or freight."

And also offered and read in evidence the duly authenticated copy of another act passed on the 18th day of March, 1882, and in force November 16th, 1886, amending and re-enacting various sections of chapter 24 of West Virginia, as follows:

"30. Any corporation duly incorporated by the laws of any State or Territory of the United States or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this State, upon complying with the requirements of this section, and not otherwise. Such corporation so complying shall have the same rights, powers and privileges and be subject to the same regulations, restrictions and liabilities that are conferred and imposed by this and the

fifty-second and fifty-third chapters of this code on corporation chartered under the laws of this State. Every such corporation shall file with the secretary of state a copy of its articles of association, and of the law or authority under which it is incorporated. The secretary of state shall issue to every such corporation complying with the provisions of this section, a certificate of the fact of its having done so, which certifi-
137 cate shall be filed and recorded in the clerk's office of the county court of the county, or one of the counties in which its business is conducted. Such corporation shall also file in said clerk's office a copy of its charter, to be kept and preserved therein. Every railroad corporation doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia or this State, is hereby declared to be as to its works, property, operations transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters, relating to such corporation. No railroad corporation which has a charter or any corporate authority from any other State shall do business in this State as the lessee of the works, property or franchises of any other corporation or persons, or otherwise, or bring or maintain any action, suit or proceeding in this State until it shall in addition to what is hereinbefore required, file in the office of the secretary of state, a writing duly executed under its corporate seal accepting the provisions of this section and agreeing to be governed thereby; and its failures so to do, may be pleaded in abatement of any such action, suit or proceeding, but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section, upon any contract or for any wrong."

The defendant, by its counsel, then offered and read in evidence the duly authenticated copy or copies of the articles of association of the Newport News and Mississippi Valley Company, and
138 the law and authority under which said company was incorporated, as the said articles and authority are of record in the office of the secretary of state of West Virginia, being, first, the act of the General Assembly of Connecticut approved March 27th, 1884, incorporating the Southern Pacific Company, with the grant of power to buy, lease, operate railroads in any State or Territory of the United States or in any foreign country, heretofore mentioned and described in Exhibit H. T. W. No. 7 to the deposition of H. T. Wickham, fixing the capital stock of said corporation at $1,000,000, divided into shares of $100 each, and providing that whenever $500,000 shall be subscribed and ten per cent. of said subscription shall be paid in cash the stockholders of said corporation may organize the same, and said corporation may proceed to do business; second, the affidavit of I. E. Gates, secretary of the Southern Pacific Company, showing the acceptance of said charter by the vote of the majority of the corporation and the subscription of $500,000 of the capital stock of said company on the 10th day of May, 1884, and

the payment in cash of ten per cent. of such subscriptions at the time of subscription, the organization, adoption of by-laws, and election of board of directors of said corporation; *third*, the act or resolution of the Connecticut legislature approved March 19th, 1885, changing the name of the Southern Pacific to the Newport News and Mississippi Valley Company, with the powers and privileges and subject to the liabilities belonging to or incurred by the company under its former name, as if said change had not been made, each and every one of the foregoing papers being accompanied by the certificate of the secretary of state of Connecticut that the same is a correct copy of the record of file in his office.

139 Next the copy or copies of the same articles of association and law and authority of incorporation of the Newport News and Mississippi Valley Company, as the same are of record in the clerk's office of the county court of Kanawha county, West Virginia, with the certificate of the clerk of said court, duly authenticated according to Federal law, that the same is a true copy of the record in his office.

Next the duly authenticated copy of the certificate of the secretary of state of West Virginia, as the same is of record in the clerk's office of the county court of Kanawha county, West Virginia, as follows:

STATE OF WEST VIRGINIA,
Office of the Secretary of State.

I, Henry S. Walker, secretary of state of the State of West Virginia, do hereby certify that the Newport News and Mississippi Valley Company, a corporation created, organized, and existing under and by virtue of an act or joint resolution of the General Assembly of the State of Connecticut passed at its January session, A. D. 1884, and approved March 27th, 1884, and under and by virtue of a subsequent act or joint resolution passed by the General Assembly of said State at its January session, A. D. 1885, approved March 19th, 1885, has this day filed in my office a copy of its charter and of the law under which it is incorporated.

I further certify that the said Newport News and Mississippi Valley Company has this day filed in my office a writing, duly executed under its corporate seal, accepting the provisions of section 30, chapter 54, of the Code of West Virginia, and agreeing to be governed thereby.

140 Given under my hand and the great seal of the said State, at the city of Charleston, this twenty-seventh day of July, 1886.

[G. S.] HENRY S. WALKER,
Secretary of State.

And next the duly authenticated copy of the acceptance of the Newport News and Mississippi Valley Company of the provisions of the Code of West Virginia, and agreement to be governed thereby, in words and figures as follows:

"The Newport News and Mississippi Valley Company, a corporation created, organized, and existing under and by virtue of an act or joint resolution of the General Assembly of the State of Connecticut, passed at its January session, A. D. 1884, and approved March 27th, 1884, a copy of which is herewith filed, and under and by virtue of a subsequent act or joint resolution, passed by the General Assembly of said State at its January session, A. D. 1885, approved March 19th, 1885, a copy of which is also herewith filed; desiring to do business as such corporation in the State of West Virginia, as lessee of the works property and franchises of the Chesapeake and Ohio Railway Company, hereby accept the provisions of section 30, of chapter 54 of the Code of West Virginia, and agrees to be governed thereby.

In witness whereof, the said Newport News and Mississippi Valley Company, has caused its corporate seal to be hereto af-
141 fixed, and this instrument of writing to be signed on its behalf, by its president, and attested by its secretary, this 21st day of July, 1886.

NEWPORT NEWS AND MISSISSIPPI VALLEY CO.,

[SEAL.] By C. P. HUNTINGTON, *President.*

Attest: I. E. GATES, *Secretary.*

The defendant, by its counsel, next offered and read in evidence the duly authenticated copy of an act of the Virginia legislature to ratify and confirm the lease of the C. & O. Railway Company to the Newport News and Mississippi Valley Company, in words and figures as follows:

Acts of the General Assembly of Virginia.

Extra session of 1887.

Chap. 219. An act to ratify and confirm the lease of the Chesapeake and Ohio railway to the Newport News and Mississippi Valley Company, approved May 14th, 1887.

1. Be it enacted by the General Assembly of Virginia, That the lease made by the Chesapeake and Ohio Railway Company to the Newport News and Mississippi Valley Company, of its railroad, property and rights, bearing date on the 15th day of June, eighteen hundred and eighty-six, be and the same is hereby ratified and confirmed; Provided, however, that the said Newport News and
142 Mississippi Valley Company shall pay all taxes assessed upon its property or the property of the Chesapeake and Ohio Railway Company in lawful money and not in coupons.

2. This act shall be en force from its passage.

In this connection the defendant's counsel offered to prove that the sessions of the General Assembly of Virginia were biennial, but that extra sessions had been often held in the intervals; that the regular session of 1885-'6 ended about March, 1886; that an extra

session was called and was in session from March 23rd to May 24th, 1887. The next regular session was held about January 5th, 1888, and that between the earliest and the latest date mentioned no other session of the General Assembly was held; but the presiding justice said that the court would take judicial notice of all of these facts.

The defendant, by its counsel, next offered and read in evidence the following sections of the Revised Statutes of Indiana, viz., Nos. 5130 and 5131, with the certificate of the secretary of state of Indiana under the seal of said State; that the same came into force May 31st, 1879, and have been continuously in force ever since.

The sections are as follows:

"SEC. 5130. A married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings and profits of any married woman, accruing from her trade, business service or labor, other than labor for her husband, or family, shall be her sole and separate property.

SEC. 5130. A married woman may bring and maintain an
143 action in her own name against any person or body corporate for damages for any injury to her person or character, the same as if she were sole; and the money recovered shall be her separate property, and her husband, in such case, shall not be liable for costs."

And next offered and read in evidence the duly authenticated copy of the act of the Kentucky legislature which became a law April 11th, 1873.

A Copy of Chapter 768 *of the Acts of* 1873.

"An act for the benefit of married women in this Commonwealth.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. That the wages and compensation of married women, for service and labor done and performed by them, shall be free from the debts and control of their husband-; and their employers are allowed to pay such wages and compensation directly to such married women, and payment to them shall be a full discharge and acquittance of the employer.

SEC. 2. This act to take effect from and after its passage.

Approved April 11th, 1873."

The defendant next offered and read in evidence a duly certified copy of certain proceedings in the circuit court of Henrico county, State of Virginia, consisting of a bill in chancery praying for the appointment of a receiver for the C. & O. Railway Company and the decree of the circuit court aforesaid appointing a receiver to said railway company, and which are as follows:

144 In the Circuit Court of Henrico.

To the Hon. Beverly R. Wellford, judge of said court:

Your orator, Collis P. Huntington, a citizen of the State of New York, respectfully shows unto this honorable court that on the 27th

day of October, 1887, there was entered in the circuit court of the city of Richmond a judgment in his favor against the Chesapeake and Ohio Railway Company, a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of Virginia and West Virginia, for the sum of $1,756,034.16, with interest thereon, at the rate of six per cent. per annum, from the 30th day of September, 1887, until paid.

A certified copy of said judgment and proceeding on which the same was entered is herewith filed, marked Exhibit C. P. H. No. 1; that upon said judgment execution was duly issued, but your orator is informed and charges the fact to be that said Chesapeake and Ohio Railway Company has no interest in any personal property that can be reached by said process of execution, and that the same is unavailing. Your orator further alleges that the moneys for which such judgment was rendered were advanced by your orator to said Chesapeake and Ohio Railway Company for the payment of pay-rolls of employees, the maintenance, repair, and improvement of the road-bed and other property to enable the said company to operate the same safely and economically, to make provision as far as might be for interest obligations of said company, and to enable it to properly and prudently administer its property and carry out the purposes for which it was created.

145 Your orator further avers that on the 15th day of June, 1886, said Chesapeake and Ohio Railway Company leased its railroad, extending from Phœbus, in the State of Virginia, to Huntington, in the State of West Virginia, with the sidings and branches thereof, and all rights under a certain agreement with the Elizabethtown, Lexington and Big Sandy Railroad Company in respect to the railroad between Huntington and the west side of the Big Sandy river, and all equipment of the said Chesapeake and Ohio Railway Company to the Newport News and Mississippi Valley Company, a corporation duly incorporated, organized, and existing under and by virtue of the law of the State of Connecticut, for the term of two hundred and fifty years, the consideration of said lease being the sum of $5,000 per annum and the agreement on the part of said last-named company to operate said line of railroad, and from the income derived therefrom to pay the cost of operating the same and the incidental expenses connected therewith and for maintaining, improving, and keeping up said railroad, with its appurtenances, and after the payment and deductions aforesaid to apply the residue of the net earnings and income to the payment and discharge of interest obligations upon the bonded indebtedness of said Chesapeake and Ohio Railway Company, any surplus remaining to be turned over to said company for distribution among its stockholders, and in the event the surplus should exceed the amount of six per cent. per annum upon the par value of the then existing stock of said company such excess to be retained by said Newport News and Mississippi Valley Company. A copy of said lease is also herewith filed, marked "Exhibit C. P. H. No. 2."

146 Your orator further shows to the court that there is now pending in the circuit court of the city of Richmond a suit in

the name of Duncan and Calhoun, trustees, &c., plaintiffs, against The Chesapeake and Ohio Railroad Company and others, defendants, in which a decree was entered on the 29th day of June, 1878, wherein it was, among other things, adjudged and ordered that said cause remain upon the docket of said court and stand continued, with leave to Joseph Bryan and Henry T. Wickham, trustees, as therein set forth, to apply to said court from time to time for such instructions as might be needful touching the execution of the trusts therein preserved, continued, and established and for such relief as might be proper in the event of any default on the part of said Chesapeake and Ohio Railway Company in complying with the provision of the trust deed therein referred to, or in the event that such application might be needful for the preservation and protection of the trust property and estate and the due application of the same to the uses and purposes specified in said trust deed and for all the purposes specified therein said circuit court of the city of Richmond retained said cause, its jurisdiction over the same, over the parties thereto, and the premises and property embraced in the said trust deeds; that pursuant to said decree the plaintiffs in said suit filed their amended and supplemental bill, making the Chesapeake and Ohio Railway Company and Joseph Bryan and Henry T. Wickham, trustees in the mortgage provided for by said decree of the 29th of June, 1878, parties defendant; that process under said amended and supplemental bill was duly executed upon said Chesapeake and Ohio Railway Company and said Joseph Bryan and Henry T. Wickham, trustees as aforesaid, and
147 they were thereby brought regularly before the court and made subject to its jurisdiction in the premises.

Your orator further shows that the debts or a large portion thereof secured by said mortgage or deed of trust to said Bryan and Wickam, trustees, still remain due and unpaid, but no default has been made in the payment of interest thereon, so that no application has yet been made by said Bryan and Wickam for relief under the leave thereby reserved to them to make such application.

Your orator, however, has been informed and charges it to be true that upon and in respect of the interest coupons appertaining to certain of the bonds of said Chesapeake and Ohio Railway Company, known as "series B," and secured by a mortgage of inferior lien to that of the said Bryan and Wickam, trustees, above referred to, maturing on each interest day upon and after the first day of May, 1885, there has been paid interest at a less rate than the stipulated rate of six per cent. per annum, and your orator believes and charges that upon the interest coupon appertaining to said bonds maturing on the first day of November, 1887, still further default will be made by said company.

Your orator charges that the said Chesapeake and Ohio Railway Company is wholly insolvent; that the said Newport News and Mississippi Valley Company, under the lease and agreement aforesaid, is only liable to appropriate the income and earnings derived from the operation and management of the property aforesaid, as hereinbefore set forth, and your orator has been informed that the

net income and earnings, after the deductions provided for in sai
lease and agreement, have been insufficient to meet the accruin
interest upon the mortgage indebtedness of said Chesapeake an
Ohio Railway Company, and he avers that said Newpor
148 News and Mississippi Valley Company has wholly refused t
make provision for the payment of your orator's just demand
against the Chesapeake and Ohio Railway Company or any par
thereof.

Your orator is advised that it is doubtful whether he can obtai
the relief asked for in this bill under the provisions of said decre
of the circuit court of the city of Richmond entered therein on th
29th day of June, 1878, hereinbefore referred to, or otherwise i
said suit of Duncan and Calhoun, trustees, &c., against The Ches
peake and Ohio Railway Company and others, but that this cou
hath power to grant him the relief he seeks, subject to the rights
the said Bryan and Wickam, as trustees, to apply to said circuit cou
of the city of Richmond in said cause for such relief as they ma
be entitled to ask under said provisions of said decree and to th
right and power of said circuit court of the city of Richmond t
exercise, whenever the occasion may arise for it to do so, the juri
diction thereby reserved over the property and franchises of th
Chesapeake and Ohio Railroad Company, and he accordingly bring
this suit in this honorable court, praying that it will grant him th
relief he seeks until and unless said circuit court of the city
Richmond shall exercise its jurisdiction, reserved as aforesaid, i
such manner as to oust the jurisdiction of this court.

Your orator is advised that the judgment which has been co
fessed in his favor, as hereinbefore set forth, and the execution whic
has been issued thereon and is in the hands of the sheriff, as herei
before stated, constitute a lien upon all the property, real and pe
sonal, of the Chesapeake and Ohio Railway Company, and he
also advised that independently of the lien thus acquired th
149 nature, purpose, and application of the advances made b
him from time to time, as set out in the account filed as "E
hibit No. 1," hereinbefore referred to, create a lien in favor of yo
orator for said advances upon the property, real and personal, of sa
Chesapeake and Ohio Railway Company and its income, and furnis
just ground for the interposition of this court for his relief by th
enforcement or the payment of the same out of said property
from the income and profits to be derived from the operation of sa
road.

Being remediless in the premises save in a court of equity, whe
such matters belong and are cognizable, and to the end that yo
orator may receive such protection as under the rules and practi
of a court of equity he may be entitled—

Your orator prays that the said Chesapeake and Ohio Railwa
Company and the said Newport News and Mississippi Valley Co
pany may be made parties defendant to this bill of complaint a
required full answer thereto to make and file; that process ma
issue, according to the usual practice of this court, directed again
the defendants above named; that an injunction may be award

restraining the said Newport News and Mississippi Valley Company from further interfering with the property aforesaid; that a receiver of the said property of the said defendant, the said Chesapeake and Ohio Railway Company, be appointed; that this court supervise the maintenance and application of such property and its earnings to the uses and purposes to which the same should justly and equitably be applied; that the due payment and discharge of the sums of money advanced in cash, as aforesaid, for the purposes aforesaid, for which judgment has been rendered, as aforesaid, be di-
150 rected and provided for, and that such other, further, and general relief in the premises be granted to your orator as the nature of the case may require and to equity shall be fit; and, as in duty, &c., your orator will ever pray, &c.

(Signed) COLLIS P. HUNTINGTON,
By M. L. MILLHOUSE, *Counsel.*

In the Circuit Court of the County of Henrico, in the State of Virginia, October 27th, 1887.

COLLIS P. HUNTINGTON, Plaintiff,
vs.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY and The Newport News and Mississippi Valley Company, Defendants. } In Chancery.

This day came Collis P. Huntington and, by leave of the court, filed his bill of complaint and exhibits therewith against The Chesapeake and Ohio Railway Company and The Newport News and Mississippi Valley Company, defendants; and said defendants, respectively, waiving service of process thereon and appearing and filing their separate answers to said bill and consenting that said cause may now be heard, it is ordered by this court that the same be docketed; and thereupon the same came on this day to be heard accordingly upon said bill and exhibits therewith filed and the answers of said defendants without replication to either of the
151 same, and was argued by counsel.

On consideration hereof, the court doth adjudge, order, and decree—

That Williams C. Wickham, of the county of Hanover, in the State of Virginia, be, and he is hereby, appointed receiver of all and singular the property and franchises of the defendant, The Chesapeake and Ohio Railway Company, including the railroads and franchises of the said corporation and their appurtenances, and all and singular the lands, tenements, and hereditaments, rolling stock, tools, machinery, engines, books, papers, records, and all other property of every kind and description of and belonging to the said corporation.

That said receiver, before entering upon the performances of his duties as such under this order, give a bond for the faithful performance of his duties as receiver in the premises, in the sum of two hundred thousand dollars ($200,000.00), with sureties, said bond to be approved as to form and sufficiency by this court.

That said receiver proceed to take possession of all and singular the premises, property, and franchises whereof he is hereby appointed receiver, and if any question shall arise as to the property embraced within the provisions of this order or any part thereof, the said receiver have leave to apply to this court for further instructions in the premises.

That said receiver shall continue the operation of the said railroad in the ordinary and usual course as the same is now operated for the common carriage of passenger- and freight, having due regard to the public interests and the accommodation of the public, keeping the premises and property, both real and personal,
152 in good condition and repair, to the end that such road may be efficiently operated with safety and convenience to the public.

To the same end he shall have authority from time to time to employ and discharge all needful laborers, servants, agents, attorneys and counsel, and purchase and pay for all needful material and supplies; to settle and adjust with other lines all outstanding traffic and balances in the usual course of business, and to make from time to time all needful and proper traffic arrangements with other lines for the interchange of business; to pay all taxes upon the property whereof he is appointed receiver that may be or become due and payable during this receivership; to prosecute and defend, without the further order of the court, all existing actions by or against said company, and to defend all actions that may hereafter be brought against company or against him as such receiver by due process of law, and to pay the expenses of such prosecution and defense, with full power to compromise, adjust, and settle in his best discretion all such actions, suits, claims, or controversies now existing or that may hereafter arise; to maintain and preserve the corporate organization and franchises of the said company, and to defray the necessary and proper expenses incident thereto, subject in all things, however, to such order and directions as this *company* from time to time — hereafter make in the premises.

That the said receiver, as soon as may be after he shall have entered upon the performance of his duties hereunder, shall make and file with the clerk of this court in this cause a complete inventory of all the property of which he is appointed receiver and which may come into his possession, and said receiver shall keep true, full, and particular accounts of all of his acts and do-
153 ings as such in the premises, and of all his expenses, payments, and disbursements, and shall render and file monthly accounts of all his acts and doings in the premises before Thomas J. Evans, who is hereby appointed a special commissioner for that purpose, accompanied by proper vouchers, and said special commissioners shall, within ten days after receiving the same, examine into and file his report thereon and any exception thereto, if any, filed before him with the clerk of this court in this cause, and leave is reserved to any party interested to file exceptions thereto within thirty (30) days, and any question or questions which may arise on the accounting aforesaid shall be reported to this court for examina-

tion and decision, such accounting, when from time to time had and completed, to be final and conclusive.

That said receiver shall collect and receive all debts due and owing to said company, and the toll, income, revenue, and earnings to accrue from its business, and deposit the same in any State or city depository in the city of Richmond, Virginia, to be thence drawn out from time to time as may be necessary hereunder, and said receiver shall pay off and discharge the amounts due from the Newport News and Mississippi Valley Company for services rendered by its agents and employees in the operation of the Chesapeake and Ohio Railway Company under the lease a copy whereof is filed with the plaintiff's bill, and for all necessary supplies and material for said road as may be due and owing from it and have preference under the statutes and laws of the States of Virginia and West Virginia and the decisions of their courts, leave being given said receiver to apply to this court for further directions in the premises
154 should the same become necessary, and this court will hereafter take such action as may be necessary and proper for a settlement of the accounts between said lessor and lessee companies and the adjustment of all equities between them arising out of their relation as lessor and lessee.

It is further ordered that said receiver, exercising due caution and prudence in the selection thereof, shall not be responsible for the wrongful acts of his servants and agents, and he shall not in any case incur any personal or individual liability in the operation of said railroad or otherwise in the premises by reason of any act or thing done by him or his servants, agents, or attorneys, the said receiver acting in good faith and in the exercise of his best discretion.

It is further ordered that the said defendants and all other persons whatsoever be, and they are hereby, strictly commanded peacefully to deliver up and surrender to said receiver all and singular the premises whereof he is hereby appointed receiver.

But this decree is entered without prejudice to the right of Joseph Bryan and Henry T. Wickham, trustees in a deed of trust or mortgage executed by said Chesapeake and Ohio Railway Company pursuant to the provisions of the decree of the circuit court of the city of Richmond entered in the suit of Duncan and Calhoun, trustees, &c., against The Chesapeake and Ohio Railroad Company and others on the 29th day of June, 1878, or to any of the creditors secured by said deed, to apply to and obtain from the said circuit court of the city of Richmond such relief as they may be entitled to under the provisions of the said decree of 29th June, 1878, above named, the action now taken by this court not being designed
155 to attempt — impair or interfere with the jurisdiction of the circuit court of the city of Richmond over the property, &c., as reserved by said decree.

And thereupon the said Williams C. Wickham, in open court, with Isaac Davenport, Jr., and Franklin Stearns, his sureties (the said Franklin Stearns by Henry T. Wickham, his attorney-in-fact), justified on oath as to their sufficiency, the said Isaac Davenport, Jr., in open court, and the said Franklin Stearns, by said power of at-

torney, entered into and acknowledged a bond in the penalty of two hundred thousand dollars; which bond is approved as to form and sufficiency by this court.

The plaintiff objected to the admission of the copies of the bill and decree aforesaid as incompetent and irrelevant, but the presiding judge admitted the same in evidence; to which ruling and action of the court the plaintiff excepted, and the presiding judge then and there entered the said exception on his minutes.

And the defendant next offered in evidence a copy of a similar decree *in totodem verbis* of the circuit court of Kanawha county, Virginia; to which plaintiff objected, and which the presiding judge admitted in evidence. The same exception was noted.

Here the defendant rested.

The plaintiffs, further to maintain the issues on their part joined, called in rebuttal the plaintiff, LAURA P. HOWARD, who testified that she was married in 1864; that when Dr. Brock paid her $200 and she signed the paper, about which she had testified, there was nobody else in the room save herself and Dr. Brock. "He
156 just gave me a paper to sign and I signed it, I suppose. I had been signing pay-rolls at the Agricultural Department, and I supposed I was signing a receipt for the money." The Doctor told her the money was given "to tide her through," and said the company would "see her through," or something to that effect.

Q. And you further testified that he did not read this paper to you and you did not read it? A. No, sir; I did not.

Q. Is what you told us yesterday (testimony-in-chief) substantially all that happened between you and him? A. Well, that was all.

Q. When did you first hear that the C. & O. R. R. claimed that that paper was a release of all of your right of action against them? A. Gen. Henkle told me that.

Q. After this suit had been brought? A. Yes, sir.

Q. Did you ever hear before that this railroad company claimed that that paper was anything else except a receipt for $200? A. I did not.

Cross-examination:

Q. Who brought the doctor up to your room? A. Mrs. Warder brought him up and she went out of the room.

Q. She did not stay at all? A. No, sir.

And, further in rebuttal, the plaintiffs called Mrs. MARY E. WARDER, who testified that Mrs. Howard was staying at her house, and that she showed Dr. Brock up to Mr. Howard's room, and
157 did not remain in the room, and left no one in it except Mrs. Howard and Dr. Brock; that no one, to her knowledge, went in while Dr. Brock was there. When Dr. Brock went away witness went to the door with him; did not know who he was, though.

Cross-examination:

Q. You did not think it improper to stay in the room while he was there, did you? A. Not at all; I thought it was business, and it was her business, and I did not go in. I knew he called on business. When he came out of the room witness went down the steps with him and saw him out of the door, but still did not know who he was. Witness was in another room, but saw him come out.

And, further in rebuttal to maintain the issues on their part joined, the plaintiffs, by their counsel, read in evidence the deposition of GEORGE E. SAMPSON, taken on behalf of the defendant. Deponent resided April 4th, 1893, in Huntington, W. Va.; his occupation, locomotive engineer on the C. & O. railway; had been a locomotive engineer about twenty-three years; in 1886 was a travelling engineer.

Q. On what road? A. N. N. & M. V.

Q. What company operated what is known as the E., L. & B. S. railroad in Kentucky during the year 1886? A. The Newport News and Mississippi Valley Company. Deponent went to the place of the accident at Soldier the evening following the accident and assisted in clearing up the wreck; found two cars off the track,
158 one sleeper and one coach over the embankment, or over the trestle, rather, pretty badly broken up. The sleeper mashed when it went down all — of shape. He had to make out a report of the accident and in the report state the cause of the accident, if possible. He found the track all right; could not see anything wrong with the track; nothing that would account for the wreck. He examined the cars and found a broken flange on coach No. 779; it was a Piedmont Air Line coach.

Q. Did you examine the broken wheel sufficiently to see whether or not it was a fresh or an old crack? A. Yes, sir; it seemed like it was a fresh break, as well as I remember.

Q. You made an examination for old cracks or sand cracks? —. I did.

—. Did you discover any such thing as sand crack or old crack? A. No, sir; I did not. The broken flange was the cause of the accident. From where it first left the track to where it turned over was about twenty-five or thirty rail-lengths. The trestle was good. Along where the accident occurred the road was a four-degree curve. The frog point and switch were also in good condition.

Cross-examination:

We found the flange mark on the ties; it looked as though the broken part had caught as it went over. I think, probably, there was about six inches of the flange broken off. The gauge was applied to the track and it was standard gauge.

Q. You don't know whether or not it was a recent break, do you? A. No, sir.

159 Q. You cannot tell when it was broke? A. No, sir.

Q. That road there was a part of the C. & O. system, was

it not, at that time? A. No; not at that time; the E., L. & B. S. R. R. was a part of the C. & O. system, then it was changed and the whole system was the Newport News and Mississippi Valley Company, and it ran that way for several years and then it went back to the C. & O. system.

Q. It has always had the name of the C. & O. road? A. Yes, sir.

Redirect:

—. In November, 1886, what name was the E., L. & B. S. operated by and known by? A. It was known as the Newport News and Mississippi Valley Company, Eastern division.

Q. Was it or not operated by that company at that time? A. Yes, sir.

Q. I will ask you again, from the examination you made of the break in that wheel at the time you made your examination what was your conclusion as to its being an old or fresh break? A. It was a fresh break; it had not been broken long.

Q. Have you any doubt but what that break was just before the accident occurred? —. It looked like it; yes, sir.

160 Recross-examination:

Q. The Chesapeake and Ohio railway runs between Huntington and Richmond, does it not? A. Yes, sir.

Q. What company operated that in 1886? A. The Newport News and Mississippi Valley Co., I suppose.

Q. The management of the whole road from Richmond to Lexington was the same, was it not? A. Yes, sir; I suppose it was.

Q. It was all known as the Newport News and Mississippi Valley Co.? A. Yes, sir; that was my understanding of it.

Here the plaintiffs concluded their evidence and the case on both sides was closed.

And after the foregoing evidence had been given on the part of plaintiffs and defendant, which was the whole evidence in the case, and after both sides had closed, as aforesaid, the defendant, by its counsel, moved the court to instruct the jury that upon the pleadings and evidence in this case the jury must find a verdict for the defendant; but the court refused to grant said motion; to which ruling of the court refusing to so instruct the jury the defendant, by its counsel, duly excepted.

The defendant, by its counsel, further moved the court to instruct the jury that the cause of action set forth in the amended declaration is barred by the statute of limitations, and that the jury
161 must find a verdict for the defendant; but the court refused to grant said motion; to which ruling of the court refusing to so instruct the jury the defendant, by its counsel, duly excepted.

The defendant, by its counsel, further moved the court to instruct the jury that the cause of action in this case is barred by the statute of limitations, and that the jury must find a verdict for the defendant; but the court refused to grant said motion; to which ruling of

the court refusing to so instruct the jury the defendant, by its counsel, duly excepted.

The defendant, by its counsel, further moved the court to instruct the jury that if the plaintiff signed and delivered the release of her claim for damages which has been given in evidence, then parol testimony is inadmissible to contradict and vary the same, and the jury should find for the defendant; but the court refused to grant said motion; to which ruling of the court refusing to so instruct the jury the defendant, by its counsel, duly excepted.

And thereafter counsel for the plaintiffs tende-d to counsel for the defendant the sum of $200 in gold, being the sum paid to the female plaintiff "on the occasion of the signing of the alleged release in this cause;" but counsel for the defendant declined to accept the same.

Counsel for the plaintiff- thereupon moved the court to instruct the jury that under the law of this jurisdiction the execution by the female plaintiff of the paper introduced in evidence as a release is immaterial. The court declined to grant said motion, and counsel for the plaintiffs duly excepted.

162 Counsel for the defendant thereupon moved the court to strike out all the parol testimony of the plaintiffs seeking to vary or contradict the release signed by the female plaintiff. The court declined to grant said motion, and counsel for the defendant duly excepted to said ruling.

Upon being asked what exception he wished noted to the plaintiffs' seventh prayer, as to the measure of damages, counsel for the defendant answered that he desired to note no other than the objection and exception already taken to the submission of the case to the jury at all.

And thereafter the court gave the following instructions or charge to the jury:

The COURT: Gentlemen of the jury, the plaintiff, Mrs. Laura P. Howard, sues the defendant in this case for damages which she claims has resulted to her from an injury which she received while riding on a train, for which she claims the defendant was and is responsible. The ground of the recovery which she claims exists is that there was negligence in the running of the train; that the accident to the train and the injury to her were caused by the negligence of the persons in charge of the train or other persons in the employ of the defendant.

The defendant contends that the plaintiffs are not entitled to recover upon three separate grounds: First, it contends that there was no negligence—that is, that the accident did not result from negligence, but was an unavoidable accident. It also contends that if there was negligence this defendant, The Chesapeake and

163 Ohio Railroad Company, is not responsible for it, because it says that it was not responsible for the running of trains at this particular point where the accident happened, or responsible for the running of this particular train to which the accident happened. The third ground is that, even if there were negligence and the defendant was responsible for it, the plaintiff, for the consideration of

two hundred dollars, released her claim and is debarred from maintaining any action against this defendant or any other.

To present those three points clearly to you, I have prepared in writing an instruction which I now read to you:

(If you shall find from the evidence that the release offered in evidence is void, under the instruction that will be given you upon that point, and that The Chesapeake and Ohio Railroad Company, the defendant in this action, was at the time of the injury complained of in the declaration operating the Elizabethtown, Lexington and Big Sandy railroad, and that the train upon which the plaintiff, Mrs. Howard, was riding at the time of the said injury was under the direction and control of the employés of the defendant, and that the accident to the train and consequent injury to her was occasioned by the negligence of the defendant's agents or employés, then you should find for the plaintiffs.)

But if you find the release to be valid, you would find for the defendant without looking further; or if you should find from the evidence that the defendant was not operating the Elizabethtown, Lexington and Big Sandy railroad at the time of the accident, you would find for the defendant upon that ground; or, if you should find that the accident was not caused by the negligence of any one, you would find for the defendant upon that ground.

164 You therefore observe that there are three points of fact for you to determine in order to ascertain whether your verdict should be for the plaintiffs or defendant, and each must be resolved in favor of the plaintiffs in order for them to recover. If you find against their contention on either point, you would find for the defendant—that is, on the point of the release, on the point of who was operating the railroad company or the train at the time, or upon the question of negligence. If you find against the contention of the plaintiffs on either one of those three points, your verdict should be for the defendant. In order to find for the plaintiffs, you should find in accordance with their contention upon each one of those points—that is, (1) that there was negligence which caused the accident; (2) that the Chesapeake and Ohio Railroad Company was operating the road where the accident occurred and was responsible for that negligence, and (3) that this release is void—invalid.

I will now give you some more definite instructions upon each one of those points, and I will touch first upon the question of the validity of that release, because if that is valid, if you should find it valid, you need not go any further at all; it would end the case right there. If you find it void, it will be necessary to consider the other points—one or both of them.

(Upon the question of the validity or invalidity of that release you are instructed as follows:

If you shall find from the evidence that at the time the plaintiff Mrs. Howard executed the release given in evidence she was in bed and ill, and suffering to such an extent that it was a reason-

165 able act upon her part to sign the paper without reading it, and for that reason she did not read it, but relied upon the

representations of its contents made by Dr. Brock, and that the latter did not read it to Mrs. Howard, but stated to her that it was a receipt for $200 which he paid her at that time, and that she relied upon said statement and signed the release under the belief that it was a receipt only, and did not know that it was a release until some time afterwards, then the said release was at the time she signed it and is now void as a release, and cannot prevent the plaintiffs from recovering if the jury shall find them otherwise entitled; but if Mrs. Howard was in such physical condition as to make it unreasonable, in your judgment under the evidence, for her to rely upon the representations of Dr. Brock instead of reading the paper, or if Dr. Brock read it to her, or if he told her it was a release, then or in either of those events it is valid and bars the action, and your verdict should be for the defendant without inquiring further.

Now, if you should find, as I said before, that that release is valid, it ends the case without your considering further; but if you find it to be void under the instruction given, then it will be necessary for you to consider the other points, or one of them at least and perhaps both of them.)

The next point upon which I will instruct you more definitely is the question of whether The Chesapeake and Ohio Railroad Company, the defendant in this suit, was operating the Elizabethtown, Lexington and Big Sandy railroad at the time of the accident.

(There is, as you understand, no dispute between the parties here that this accident happened at or near a point called Soldier, on the line of this Elizabethtown, Lexington & Big Sandy rail-
166 road; so the question is whether the defendant here, The Chesapeake and Ohio Railroad Company, was operating that road at the time of this accident.

It is not enough, to render the defendant liable or to justify you in finding that it was operating the road, to find that it sold tickets over it. If the defendant simply sold a through ticket from Louisville to Washington or sold a round-trip ticket from Washington to Louisville and return to Washington, and the plaintiff, Mrs. Howard, had the return part of that ticket, that alone would not be sufficient evidence to establish the fact that the Chesapeake and Ohio Railroad Company was operating this Elizabethtown, Lexington & Big Sandy road. We all know that railroad companies habitually sell tickets over their own roads and, in connection with them, over other roads, so that the mere sale of such a ticket as that in itself would not be sufficient. It must appear from all the evidence to your satisfaction, not only that this defendant sold a ticket over that road, upon the faith of which this lady was riding at the time, but in order to hold the defendant liable you should find that the Chesapeake & Ohio Railroad Company as a corporation, by its officers and agents, was operating this road; that that corporation, the Chesapeake and Ohio Railroad Company, controlled this road, operated it, ran it, and that the trains which ran over it were the trains of the Chesapeake and Ohio Railroad Company;

that they were manned by their employés and controlled by their officers and agents, and unless you find that the evidence establishes that state of facts, you would find for the defendant upon that point, because in order to render the defendant liable for this accident, if it was caused by negligence, it must appear to your satisfaction by a preponderance of the evidence that the
167 Chesapeake & Ohio Railroad Company controlled and was running its trains over this road.

Perhaps I may aid you a little further upon that question without touching upon your province, for the fact is all for you.

There is evidence here tending to show that state of facts. The plaintiffs claim that the evidence is sufficient to establish it—that is, the Chesapeake & Ohio Railroad Company controlled this particular road and was running trains over it at the time of this accident. The defendant denies that the evidence is sufficient to establish those facts, and it is for you to determine which one of them is right in relation to it. The defendant also says that even if the evidence is sufficient to establish that state of facts at any time, that state of facts did not exist at the time of this accident; that it was ended in January, 1886, some months prior to this accident, by the lease which the Elizabethtown, Lexington & Big Sandy Railroad Company made to the Newport News and Mississippi Valley Railroad Company. That lease is in evidence.)

I suggest that you divide that subject into two heads. First, determine whether the evidence is sufficient, when you take it altogether, to establish to your satisfaction the fact that the defendant here, The Chesapeake and Ohio Railroad Company, was controlling and running the Elizabethtown, Lexington & Big Sandy road prior to the execution of this lease to which I have just referred. If you find the evidence insufficient to establish that, you might dismiss that subject, I should say, without looking any further, and find for the defendant. (But if you find from the evidence that the
168 Chesapeake and Ohio Railroad Company, immediately before the execution of this lease just mentioned, was operating and controlling this Elizabethtown road, then you would naturally pass to the next step, which is, whether the execution of this lease and the facts and circumstances attendant upon it ended that arrangement, so that the Chesapeake & Ohio Railroad Company ceased at the time of the execution of that lease to control and run the trains upon that road?

In considering this last question it is proper for you to consider also the lease which was made by the Chesapeake & Ohio railroad of its own road to this Newport News and Mississippi Valley road. There is a lease in evidence here, dated, I think, the first of July or thereabouts, made by the Chesapeake & Ohio railroad itself to the Newport News and Mississippi Valley road, and it is claimed by the defendant that after the execution of this last lease the whole line, not only the Elizabethtown road, but the Chesapeake & Ohio itself, was controlled and run by this Newport News and Mississippi Valley road, and that the Chesapeake and Ohio had no further agency or control in the running of either of those roads; and that

is the question for you to determine, whether at the time of the execution of those leases the Chesapeake & Ohio Railroad Company abandoned that business and turned it over to this new company, and this new company ran the trains on those roads after that time and was running them at the time of this accident? The plaintiffs contend that that was simply a formal matter; that this Newport News and Mississippi Valley Company was a mere corporation on paper, so to speak, and that there was no actual delivery of possession of the roads or stock of this new company; that the same officers and agents and men who had controlled and done busi-
169 ness before did it subsequently, and that it was really the Chesapeake and Ohio Railroad Company doing this same business under the name of the Newport News and Mississippi Valley road; and that is the question for you to determine really, the question whether that transaction was one in good faith as a business transaction or whether it was a transaction upon paper to accomplish some ulterior purpose of the parties who engaged in it.

You have heard all the evidence upon the question. It is proper for you to take into consideration not only the course of business there and what was done prior to the execution of those leases, but also what was done afterwards; what became of the Chesapeake & Ohio Railroad Company after the execution of these leases; what, if anything, it did; whether it ever resumed business, and how it and its officers treated this lease. That is all competent for you to consider. But the question finally resolves itself into the one I have tried to make plain to you, and that is whether at the time of this accident the Chesapeake & Ohio Railroad Company was the efficient agent which ran and controlled the trains that ran over the Elizabethtown, Lexington and Big Sandy railroad. If so, they are liable for any negligence that occurred on that train; if not, they are not liable.)

That brings us, then, down to the question of negligence. The evidence tends to show, perhaps, that the negligence, if there was any, might have occurred in several ways. I will not enumerate them. You have heard the evidence and you will remember what it is upon that point. But a railroad company no more than an individual is liable for an accident that could not have been pre-
vented by the use of reasonable care under all the circum-
170 stances. If an accident happens, although a person or a corporation is the active agent in its happening, if it could not have been prevented by the use of reasonable care on the part of the person through whose agency it occurred, there is no liability. Liability for the happening of an accident arises only when the person through whose agency it occurred was guilty of what we call in law negligence, and that means that he failed to use the care that it was reasonable and proper to expect of a reasonable man under all the circumstances.

Now, there is some evidence here tending to show that perhaps this accident happened from a broken flange on one of the cars, and upon that particular point the counsel for the defendant has asked an instruction which has been granted in this language:

175 *Request of Defendant's Attorney for Additions to the Record.*

Filed July 15, 1898.

In the Supreme Court of the District of Columbia.

WILLIAM HOWARD & WIFE
v.
THE CHESAPEAKE & OHIO RAILWAY CO. } At Law. No. 28242.

To John R. Young, Esq., clerk of said court:

I request the following additions to the record for the Court of Appeals in the above-entitled cause:

1. The original declaration.
2. The marshal's return of service on the defendant, the regularity thereof being in controversy.
3. The defendant's pleas to the jurisdiction of the court.
5. The following memoranda:

Jan. 4, '90. Motion to dismiss for want of prosecution.
" 9, " " to strike the plea from file & for judgment.
" 27, " Defendant's plea stricken out default; jury of inquest ordered.
Feb. 15, " Default set aside; leave to defendant to plead general issue.
" 14, " Pleas of defendant specifically denying each and every allegation of declaration; set out these
176 pleas in full.
Feb. 17, '90. Plea of general issue.
" 25, " Motion to strike these pleas from the files granted by the court and defendant ordered to plead the general issue.

5½. March 8, 1890.—Motion to strike plea from the files withdrawn.

6. Plea of general issue in assumpsit.
7. May 13, '90.—Leave to plaintiff to amend declaration granted after hearing defendant's counsel in opposition thereto.
8. June 4, '92.—Motion for leave to withdraw joinder of issue as to 2d plea and to strike said plea from the files.
9. May 18, '94.—Motion by defendant to set aside order sustaining demurrer to 2d plea overruled.
10. Nov. 30, '96.—Defendant's motion to set aside the order sustaining the demurrer to 2nd plea again overruled.
11. In notice of appeal bond filed add: Executed by M. E. Ingalls, president of Chesapeake & Ohio Railway Company.

177 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

[Ten-cent U. S. internal-revenue stamp, canceled July 30, 1898, J. R. Y.]

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 176, inclusive, are true copies of originals in cause No. 28242 at law, wherein William Howard *et al.* are plaintiffs and The Chesapeake and Ohio Railway Company is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 30th day of July, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 845. The Chesapeake and Ohio Railway Co., appellant, *vs.* William Howard & Laura P. Howard, his wife. Court of Appeals, District of Columbia. Filed Sep. 3, 1898. Robert Willett, clerk.